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IN THE

Supreme Court of the United States

October Term 1981

No. .....

THE F/V AMERICAN EAGLE, ADF&G No. 39, and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NOS. E95626 AND E95627,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

Claimants-Appellants are the owners of the F/V AMERICAN EAGLE and appeal from the order of the Supreme Court of the State of Alaska entered on the 21st day of November, 1980 (rehearing denied March 4, 1981). The appeal is taken pursuant to Title 28, United States Code, Section 1257(2). In the event this Court holds that jurisdiction is not vested pursuant to said statute, appellants request that this statement be regarded as a petition for a writ of certiorari under 28 U.S.C. § 2103.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether Alaska may assert jurisdiction over the king crab fishery in the North Pacific Ocean outside Alaska territory.

2. Whether the federal government has exclusive jurisdiction of the living resources of the Continental Shelf, including crab.

3. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska territory.

4. Whether the Alaska regulations purporting to describe the offshore area sought to be regulated were so vague as to deny claimants due process.

5. Whether claimants were denied due process by the absence of any procedure under Alaska law for in rem forfeiture cases and by the failure to provide a prompt post-seizure hearing.

PARTIES TO THE APPEAL

Claimants are Severin Hjelle, Harold Hansen, and Ryder Tynes, who are citizens of the State of Washington and who have made claim to the F/V AMERICAN EAGLE and her catch as owners. Appellee is the State of Alaska, which prosecuted the forfeiture action against the res.

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JURISDICTIONAL STATEMENT

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of Alaska is reported at 620 P.2d 657 (1980), and is set forth in the appendix as Appendix A. The findings, judgment, and final order of the trial court, the Superior Court for the State of Alaska, are set forth in Appendix F.

GROUNDS FOR INVOKING JURISDICTION

1. Nature of the Proceeding.

This case is a civil action in which a bond in the amount of $350,000.00, given as security for the F/V AMERICAN EAGLE, was ordered forfeited by the Superior Court of the State of Alaska, together with her catch, valued at $100,677.50 (Appendix F).[1] The forfeiture was based on activities of the AMERICAN EAGLE outside Alaska's territory. The claimants are the owners of the F/V AMERICAN EAGLE and are citizens of the State of Washington. Claimants contested the extraterritorial assertion of jurisdiction by Alaska on grounds of due process, the Supremacy Clause and the Commerce Clause. Claimants also contested the Alaska regulations on grounds of vagueness and challenged the Alaska civil forfeiture procedure for lack of due process.

2. Entry of the Judgment Sought To Be Reviewed.

On November 21, 1980, the Alaska Supreme Court entered an opinion and order affirming the order of forfeiture (Appendix A). On March 4, 1981, the Alaska Supreme Court entered an order denying a timely petition for rehearing (Appendix C). On April 6, 1981, the notice of appeal to this Court was filed in the Alaska Supreme Court (Appendix E).

3. Statutory Basis for Jurisdiction.

Jurisdiction is vested in this Court pursuant to Title 28, United States Code, Section 1257(2).

Claimants challenged the assertion of extraterritorial jurisdiction by Alaska solely on the basis of the Federal Constitution. Claimants further attacked the vagueness of the

1. In addition to the sums ordered forfeited, an award of $55,000.00 in attorney's fees was imposed against claimants.

regulations and the Alaska civil forfeiture procedure on federal due process grounds. Under 28 U.S.C. § 1257(2), an appeal may be taken where the validity of a state statute or regulation is drawn in question and the decision is in favor of validity. Review of the "statute" extends to every act legislative in character, including the regulations issued by the Alaska Board of Fisheries. *Sultan Ry. & Timber Co. v. Department of Labor & Industries*, 277 U.S. 135 (1928); *Hamilton v. Regents*, 293 U.S. 245 (1934). The statute or regulation does not have to be invalid on its face if invalid in the manner of application. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Cohen v. California*, 403 U.S. 15 (1971).

Claimants squarely challenged the constitutionality of the Alaska statutes and regulations, both facially and as applied, and the Alaska Supreme Court just as squarely sustained their validity, as applied. "Under these circumstances, this Court's appellate jurisdiction would seem manifest." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440 (1979).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS

The pertinent test of all constitutional provisions, statutes, and regulations are set forth in Appendix I. They are:

Constitution of the United States:
- Article I, Section 8
- Article VI, Clause 2
- Fourteenth Amendment, Section 1

Federal Acts, Proclamations, Treaties:
- Alaska Statehood Act (July 7, 1958)
  72 Stat. 339, § 6(m)

Submerged Lands Act (May 22, 1953)
43 U.S.C. §§ 1301-1315

Outer Continental Shelf Lands Act (August 7, 1953)
43 U.S.C. §§ 1331-1343

Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States (1964)
16 U.S.C. §§ 1081-85 (repealed March 1, 1977)

Fisheries Zone Contiguous to Territorial Sea of the United States (1966)
16 U.S.C. §§ 1091-94 (repealed March 1, 1977)

Fishery Conservation and Management Act of 1976 (effective March 1, 1977)
16 U.S.C. §§ 1801-82

Presidential Proclamation, September 28, 1948, Regarding the Continental Shelf Convention on the Continental Shelf (1958)

Alaska Statutes:

16.05.190 Seizure Without Warrant and Confiscation by Court

16.05.195 Forfeiture of Equipment

16.10.200 Unlawful Taking Prohibited

16.10.210 Unlawful Sale or Offer Prohibited

16.10.220 Penalties for Violation of § 200 and § 210 of this Chapter

Regulations of the Alaska Board of Fish & Game:

Regulations in Effect Now and at all Relevant Times:

5 AAC 36.010 Description of Area

Pre *Hjelle v. Brooks* Regulations:

5AAC 07.760 (repealed June 15, 1974) Quotas

5 AAC 36.040 (repealed June 15, 1974) Transportation and Possession of Shrimp, Scallops, and King, Dungeness or Tanner Crabs

Post *Hjelle v. Brooks* Regulations:

5 AAC 34.005 Statistical Areas Established
5 AAC 34.035 Closure of Registration Areas
5 AAC 34.090 Unlawful Possession of King Crab or King Crab Gear
5 AAC 34.098 Violation of Regulations
5 AAC 34.600 Description of Statistical Area
5 AAC 34.605(e) Description of Districts
5 AAC 34.610 Fishing Season
5 AAC 34.900 Description of Statistical Area

Post *State v. Uri* Regulations:

5 AAC 34.005 Statistical Areas Established
5 AAC 34.010 Application of Regulations
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STATEMENT OF THE CASE

On January 15, 1976, the AMERICAN EAGLE was seized at Pelican, Alaska, by officials of the Alaska Department of Public Safety. Thirteen days later a civil complaint was filed at Kodiak, Alaska, by the Alaska Attorney General, praying for forfeiture of the vessel and her catch for violation of Alaska regulations governing king crab fishing.

Claimants Harold Hansen, Severin Hjelle, and Ryder Tynes, all citizens of the State of Washington, appeared in the action as owners of the vessel. Claimants by answer (1) denied the jurisdiction of Alaska to regulate king crab fishing and Washington citizens outside Alaska territory, and (2) contended that the regulations sought to be enforced were void for vagueness. On February 10, 1976, over three weeks after seizure, the AMERICAN EAGLE was released after claimants were able to obtain an agreement to the posting of a $350,000.00 bond.

The case was scheduled for trial on March 29, 1977, and then continued to July 25, 1977, over claimants' objections. At trial the evidence presented by the State showed that the AMERICAN EAGLE and her gear were sighted in an area approximately six to nine miles off the Alaska coast. (Ex. 2, Tr. 140-144, 352). *See* Appendices D (Ex 2) and J (State Department delineation of three-mile limit).

By motions to dismiss submitted to the trial court and on appeal to the Alaska Supreme Court, claimants: (1) contested the extraterritorial assertion of jurisdiction, contending it denied claimants due process, and was violative of the Commerce Clause and the Supremacy Clause of the federal Constitution;[2] (2) attacked the Alaska regulations as void for vagueness under the Fourteenth Amendment, and (3) attacked the Alaska procedure for in rem forfeiture both facially and as applied to claimants for lack of due process. The motions to dismiss were denied by the trial court and the Alaska Supreme Court affirmed each ruling.

2. Claimants contend that Alaska was prohibited from regulation of king crab fishing because such crab are living creatures of the shelf and subject to the exclusive regulation of the federal government under the Outer Continental Shelf Lands Act, the Submerged Lands Act, and the area is subject to exclusive federal control.

THE SUBSTANTIAL NATURE OF THE QUESTIONS PRESENTED REQUIRES PLENARY CONSIDERATION

1. Alaska's Exercise of Extraterritorial Jurisdiction Constitutes a Denial of Due Process and Violates the Commerce Clause.

It has been long established that the exercise of jurisdiction by a state outside its boundaries is a denial of due process of law. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Norfolk & Western Ry. v. Missouri Tax Commission*, 390 U.S. 317 (1968). Such assertion of jurisdiction is also an unreasonable burden on interstate and foreign commerce. *Norfolk & Western Ry. v. Missouri Tax Commission, supra*, 390 U.S. 317; *cf. Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

It is not disputed that the activities of the AMERICAN EAGLE took place more than three miles from the Alaska coastline and outside that line as drawn by the United States Department of State.[3] (Appendix J.) It also is firmly established that the Alaska territorial boundary extends only three miles from shore. *United States v. Alaska*, 422 U.S. 184 (1975); *United States v. Maine*, 420 U.S. 515 (1975); *United States v. California (Second California)*, 381 U.S. 139 (1965). This principle was apparently accepted by the court below when it assumed "that the operations were beyond the three-mile limit." *F/V AMERICAN EAGLE v. State*, 620 P.2d 657, 660, Appendix A at 10.

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3. Alaska in its brief to the Alaska Supreme Court made an assertion that because of a headland-to-headland line, perhaps the AMERICAN EAGLES's activities took place within Alaskan territory. This argument was not raised before the trial court, no supporting evidence was offered by the State, and the Alaska Supreme Court assumed that the violations did occur beyond the three mile limit. 620 P.2d 657, 662. Appendix A, p. 10.

To support its extraterritorial assertion of jurisdiction, the Alaska Supreme Court relied on *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom. Uri v. State*, 429 U.S. 809 (1976) (for want of jurisdiction). *Bundrant* was a two-to-one decision of the same court published one week after the AMERICAN EAGLE allegedly violated the law.[4]

The opinions of the Alaska Supreme Court in this case and in *Bundrant, supra*, are a clear departure from existing law. This Court in its decision in *Skiriotes v. Florida*, 313 U.S. 69 (1941), held that a state might be allowed to regulate its own citizens outside its boundaries based upon the duty of the citizen in relation to the citizen's own government. 313 U.S. 69, 73.[4A] Claimants here are citizens of the State of Washington, not Alaska.

In *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), in which Alaska attempted to tax salmon freezer boats operating within Bristol Bay, the operators of the freezer boats were citizens of Washington and California. This court held that

4. Several court decisions were involved in the *Uri* and *Bundrant* cases. A brief explanation of the chronology may be helpful. *State v. Uri* was a consolidated case involving 16 criminal defendants charged with violation of Alaska crab regulations for activities in an area between 16 and 60 miles from shore. Those charges were dismissed by the superior court on grounds of exclusive federal jurisdiction by Judge Burke (*Uri I*, Appendix L). On appeal, the *Uri* cases were consolidated with *State v. Bundrant* and decided under that name. After the *Bundrant* decision, review by this Court was sought by the *Uri* defendants but was denied when the State argued that *Bundrant-Uri* was not a final decision. (Uri II, 429 U.S. 806.) On remand to the superior court for trial, all 16 *Uri* cases were dismissed on grounds the regulations in question were void for vagueness. (Uri III, Appendix G.) In *Uri*, Alaska also contested this Court's appellate jurisdiction on the ground that passage of the Fishery Conservation and Management Act of 1976 (FCMA), 16 U.S.C. § 1801 *et seq.*, made the federal question of jurisdiction less substantial. However, to this date Alaska has continued to assert extraterritorial jurisdiction over the king crab both by current regulations and by vessel seizure.

4A. Accord, *People v. Weeren*, 163 Cal. Rptr. 255, 607 P.2d 1279, *cert denied*, ___ U.S. ___, 66 L.Ed.2d 45 (1980).

only those operations within the three-mile limit would be subject to the tax, concluding "if the fish were taken or purchased outside Alaska's territorial waters, all of respondent's business in the Bristol Bay area would be beyond Alaska's reach." 369 U.S. 199, 203. This case presents a similar situation.

The opinion below also conflicts with the decision of the Washington Supreme Court in *Northwest Trollers v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977), which held that "Washington cannot regulate fishing beyond its three-mile limit by Oregon or California citizens." 89 Wn.2d 1, 5.

Both in *Bundrant* and in its opinion in this case, the Alaska Supreme Court refused to follow the reasoning of the three-judge court in *Hjelle v. Brooks*, 377 F. Supp. 441 (1974),[5] which had issued a preliminary injunction against Alaska's regulations purporting to set a quota for king crab fishing in the entire Bering Sea. The *Hjelle* court concluded that, to be constitutional, a state regulation must be directed toward conserving a resource within a state; if so directed, a regulation might have an indirect impact on extraterritorial conduct and yet be constitutional. Typical of such regulations are landing laws administered to facilitate enforcement of conservation schemes for resources within a state. Such regulations may be enforced against noncitizens found within the state boundaries. 377 F. Supp. 441.

At the other extreme are regulations having a direct impact on extraterritorial conduct. The *Hjelle* court found that the Alaska regulations which it was considering were expressly directed at activities outside Alaska territory. Such a scheme could not withstand constitutional attack. Alaska's

5. The named plaintiffs included Severin Hjelle, a claimant herein, a fact which did not escape the attention of the court below in affirming the one-half million dollar penalty assessed by the trial court.

assertion of jurisdiction here suffers from the same infirmity.

The Alaska Supreme Court's decisions also conflict with *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), which is discussed *infra* under the issues of federal exclusivity.

It should be emphasized that the area regulated by Alaska is not within the boundary of *any* state. As discussed *infra*, it is an area historically fished by foreign nations and subject to both national and international rights. The regulation of those rights is a function of national external sovereignty. Thus, the Commerce Clause considerations are even more important here.

> Foreign commerce is pre-eminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and national power."

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).

2. Regulation of Crab Is Exclusively Federal Under the Supremacy Clause.

The dissenting opinions of Justice Connor in this case, *State v. Sieminski*, 556 P.2d 929, 935 (Alaska 1976), and in *Bundrant* accepted the view that federal jurisdiction over king crab is exclusive, and that any state regulation is prohibited by the Supremacy Clause:

> The reason for federal pre-emption must be drawn from the rationale of the *First California* case, *supra* [United States v. California, 332 U.S. 19 (1947)]. The whole area of regulation of ocean floor resources is inextricably intertwined with international law and affairs.

546 P.2d 530. Justice Connor reasoned as follows:

> (1) State legislation is pre-empted by the OCSLA, 43 U.S.C. § 1332(a), as the crabs are legally a resource of

the ocean floor rather than of the water column above that floor.

(2) State legislation is pre-empted by the SLA, 43 U.S.C. § 1302, regardless of the characterization of the crab resource.

(3) Notwithstanding any of the above, foreign and military affairs are so inextricably intertwined with the regulation of high seas resources that, absent explicit congressional delegation to the state, the area is excluded from state regulation.

In the *First California* case, [*United States v. California*, 332 U.S. 19 (1947)], this Court held that: "The protection and control of [the marginal sea] has been and is a function of the national external sovereignty." 332 U.S. at 34. This principle was followed in *United States v. Louisiana*, 339 U.S. 699 (1950):

> As we pointed out in *United States v. California*, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. A claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U.S. pp. 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704. This concept was recently reaffirmed by this Court in *United States v. Maine*, 420 U.S. 515 (1975), which relied on *United States v. Texas*,[6] *United States v. Louisiana*,[7] and *United States v. California* [*First California*][8] in holding that: "In external affairs the United States became the

6. 339 U.S. 707 (1950).
7. 339 U.S. 699 (1950).
8. 332 U.S. 19 (1947).

sole and exclusive spokesman of the nation." 420 U.S. 523. The *Maine* and *California* cases dealt with whether or not the federal government had exclusive jurisdiction over the natural resources of the seabed within the marginal sea. Only oil and gas were important there, but the concept discussed could apply equally to living sedentary species of the Shelf. In answer to the *First California* case, the Submerged Lands Act was passed to grant to the states limited dominion over the offshore seabed and its resources within the marginal sea. 43 U.S.C. §§ 1301-1315. However, as part of the Submerged Lands Act, an express congressional statement was made with regard to the resources lying seaward of the marginal sea. 43 U.S.C. § 1302 (1953) provides:

> Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath the navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

The Submerged Lands Act was passed in May 1953 and was managed by Senator Guy Cordon (Oregon). In analyzing the Submerged Lands Act, this Court placed reliance upon Senator Cordon's debates and his explanation of the Act before the Senate. *See United States v. California*, 381 U.S. 139, 150-163 (1965) (*Second California*). Later in that same year, in what was considered until its final passage as an amendment to the Submerged Lands Act,[9] Congress passed the Outer Continental Shelf Lands Act, on August 7, 1953. The Act specified that the jurisdiction of the United States is extended to the "subsoil and seab[illegible]" of the Outer Continental Shelf for the purpose of exploring for, develop-

9. H.R. Rep. 413, May 12, 1953.

ing and removing "resources therefrom to the same extent as if the Outer Continental Shelf were an area of exclusive federal jurisdiction." 43 U.S.C. § 1333(a)(1). Another section of the Act, § 1333(a)(2), provides that federal officers and courts may enforce on the Continental Shelf civil and criminal laws of each adjacent state; however, this was to "never be interpreted as the basis for claiming any interest in or jurisdiction on behalf of any state for any purpose over the seabed . . . or the property and natural resources thereof." 43 U.S.C. § 1333(a)(3). The legislative history shows that two attempts were made by states rights senators to amend the Act to permit concurrent jurisdiction to control the disposition of the natural resources. Both these attempts were defeated on the argument of Senator Cordon that, "With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state." 1953 Congressional Record, Senate, pp. 7226-7232, 10472. Additionally, Senator Cordon indicated strong approval for the position of the Department of Justice that, "Particularly in view of the intermingling of national and international rights in the area, it is important that the federal government, which has the responsibility of foreign relations, have the exclusive control of law making and law enforcement there." 99 Cong. Rec. 6963 (1953).

The *Bundrant* decision and the opinion in this case are in conflict with *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), which the Alaska Supreme Court described as "troublesome." 546 P.2d 530. Ray held that coral reefs more than three miles off the coast of Florida "are 'natural' resources within the Outer Continental Shelf Lands Act," 423 F.2d 16, 19. The court also held that the Geneva Convention on the Continental Shelf confirmed and crystallized the ex-

clusive federal rights. 423 F.2d 16, 21. The natural resources referred to in the Convention include "living organisms belonging to sedentary species, that is to say organisms which at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." (¶ 3, Art. 2.) King crab like coral has been defined by federal law as one of the sedentary species, is a living resource of the shelf and is not subject to Alaska regulation.[10]

3. The Regulations Sought To Be Enforced Are Void For Vagueness.

The Alaska regulations are impermissibly vague and their enforcement against the AMERICAN EAGLE denies claimants due process of law.

The seizure of the AMERICAN EAGLE took place before the Alaska Supreme Court's decision in *State v. Bundrant, supra,* which for the first time provided support for an assertion of jurisdiction by Alaska beyond three miles from shore. Up to that time, the courts that had considered the issue had held that Alaska's regulations could not be applied beyond her territorial waters. In *Hjelle v. Brooks, supra,* 377 F. Supp. 430, the United States District Court for Alaska had enjoined the enforcement of regulations applicable on their face beyond the three-mile limit. In response to that decision, Alaska adopted new regulations—which are at issue here—that did not facially assert jurisdiction outside of the waters of Alaska. In *State v. Uri* [*Uri I*] (Appendix L),

10. Under the Bartlett Act, 16 U.S.C. § 1085, king crab were expressly claimed by federal law as a sedentary species. That act was replaced in 1977 by 16 U.S.C. § 1802(4) which sustains that claim. Justice Connor of the Alaska Supreme Court would include scallops as a shelf resource even though not named as such by federal law. *State v. Sieminski,* 556 P.2d 929, (Alas. 1976).

Justice Burke of the Alaska Supreme Court, then sitting as a superior court judge, held that any attempt to apply those new regulations more than three miles from shore would be in conflict with an area of exclusive federal jurisdiction. It was Judge Burke's decision in *Uri I* that was overturned in the consolidated case of *State v. Bundrant* and *State v. Uri, supra,* 546 P.2d 530.

The state of the law at the time the AMERICAN EAGLE was seized is characterized in the opinion below as "unsettled," 620 P.2d 657, 672, Appendix A at 56. The existing case law held Alaska regulations could not be applied beyond three miles, and the regulations themselves gave no notice on their face that they were intended to be applied beyond three miles from shore.

The post-*Hjelle v. Brooks* regulations enforced in this case set up a series of statistical areas. Under 5 AAC 34.005:

> (b) Each statistical area consists of:
>
> (1) a *registration area,* comprised of all the waters within the statistical area which are *waters subject to the jurisdiction of the state;* and
>
> (2) *an adjacent seaward biological influence zone,* comprised of all the waters within the statistical area which are not part of the registration area.
>
> (c) *Registration areas are areas in which the department shall apply* conservation and management *regulations* in order to protect and maintain the king crab resources of the state.
>
> (d) *Adjacent seaward biological influence zones* are areas which the department shall utilize to *obtain* biological and fishing effort *data* and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

(Emphasis added.) Thus, it was clear that only "registration

areas" were subject to regulation or closure.[11] The present dispute arose because there was no definition of the outer boundary of a registration area; the registration areas were merely described as "waters subject to the jurisdiction of the state."[12] The Alaska Supreme Court, in its opinion below, acknowledged the ambiguities in the regulations. "Some ambiguity did exist in the applicable regulations, as a result of conflict over the extent of the state's jurisdictional powers." (Citing *Hjelle v. Brooks, supra*, 620 P.2d 657, 663.) After reviewing the regulations, the court noted:

> Thus, the *seaward boundary of the area in which the state intended to enforce its regulations within each statistical area was left unspecified.* The intent, according to the state, was for the boundary to extend as far beyond the three-mile limit as state jurisdiction could be justified in a trial on the merits under the *Hjelle* criteria.

620 P.2d 657, 644 (emphasis added). The Alaska Commissioner of Fish and Game, James Brooks, who adopted the regulations, testified that the registration area was "a geographical area without a precisely defined outer limit" and that the boundary was intended to move with crab migration. R. 166-7, 174-5.[13]

As noted by the Alaska court, the ambiguity in the regula-

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11. 5 AAC 34.035 and .610 also confirmed that only registration areas were subject to closure. *See* Appendix I.

12. The only place where any definition coming close to "waters subject to the jurisdiction of the state" could be found was in 5 AAC 39.975(13), which provided: " '*waters of Alaska*' means the waters north and west of the International Boundary at Dixon Entrance including those extending *three miles seaward* (a) *from the coast*; . . ." (Emphasis added.) The corollary for this regulation is 5 AAC 36.010 which provides: "The *International Water* area included *all waters waters outside Alaska's three-mile limit, i.e.*, beyond those described in 5 AAC 39.975(13)." (Emphasis added.)

13. The confusion by Alaska also extended to the Attorney General's office. In its brief to the Superior Court in *Uri*, the State suggested that the boundaries moved with the migration of the crab. R. 84.

tions was not an oversight. 620 P.2d at 664 (quoted above). The State wished to avoid another injunction by the federal court in the *Hjelle* litigation and was unwilling to make a clear assertion of jurisdiction beyond three miles from shore without some new support from the courts. In *Bundrant*, the Alaska Supreme Court provided that support. In addition, following remand of *Bundrant* and *Uri*, the superior court issued two decisions concerning the vagueness of the regulations. The superior court held, in *Uri III*, that the terms "registration area" and "statistical area" were not synonymous. As to offenses alleged to have occurred more than three miles from shore, the court stated:

> I further find that 5 AAC 34.035 governs the opening and closing of fishing seasons in Registration Areas only, not in statistical areas; therefore Registration Areas should be specifically described or 5 AAC 34.035 should be amended to apply to the opening and closing of seasons in "Statistical Area."

Memorandum of Decision and Order of Dismissal, p. 4 (Appendix G).

Uri III was followed by *State v. The F/V Quinhagak* (Appendix H), which also held the regulations void for vagueness. The State did not appeal from either decision. Instead, it amended its regulations to remove the ambiguity about where they applied.[14]

The present regulations are set forth in Appendix K, together with the prior regulations which are at issue in this case. Their comparison illustrates the defect in the regulations at issue and the case of cure once the state decided to

14. The regulations in *Uri* involved the Bering Sea, while the regulations here involve the North Pacific Ocean. In *Uri*, the "statistical area" was all waters of the Bering Sea; here, the statistical area extended to the 800 fathom curve. However, the regulations were identical in leaving the boundary for the "registration area" unspecified.

give clear notice of its intentions.[15] The State's effort to shift the burden of guessing about the limits of its maximum jurisdictional reach under the regulations at issue was impermissible and renders those regulations void for vagueness.

Regulations controlling the Alaska crab fishery must be sufficiently definite so that crab fishermen can tell when they are violating the regulations and when they are not. Courts have repeatedly required that criminal laws be defined with particular clarity under the realistic belief that people should not be required to pay penalties for violating laws they cannot understand. As this Court said in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939):

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 70 L. Ed. 332, 328, 46 S. Ct. 126: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

At the time the AMERICAN EAGLE was seized, all existing

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15. The present version of 5 AAC 34.005 confirms that a registration area is comprised of the territorial waters of Alaska—the only reasonable definition of "registration area" under either version of the regulations. But the present regulations also state unequivocally at several places that regulations and closure orders now apply throughout the statistical areas, in both registration areas and seaward biological influence zones. 5 AAC 34.005(d); .010; .035(f); .091. That was not the case under the regulations in issue.

case law held that Alaska could not regulate outside its territorial waters, and a reading of Alaska's regulations gave no notice that it intended to do so.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide the explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104 (1972). The lack of specificity in the regulations at issue was intentional and impermissible.

The Alaska Supreme Court, while acknowledging that "the ambiguity in the language is evident," 620 P.2d 657, 664, held that such ambiguity was cured by the action of a field biologist when he issued an emergency order closing a district with an outer boundary coinciding with the statistical area boundary or the 800 fathom curve.[16] However, the activities proscribed by regulation, and in turn made illegal by Alaska statute,[17] were limited to transporting crab in a closed *registration area* by a vessel registered for that area but not validly registered for another *registration area* for

16. The Egg Island District was defined by 5 AAC 34.605(c) as being a portion of Statistical Area O, with definite east, west, south, and north boundaries. The south boundary was the same as that for the statistical area or 800 fathom curve. That curve is approximately 30 miles offshore.

17. AS 16.10.200.

which the season is open;[18] possession of unprocessed crab *within a registration area* unless the vessel is validly registered for the area and the season is open;[19] or possession aboard a vessel licensed as a commercial fishing vessel *within any registration area* any crab or any gear used in the taking of crab which are prohibited by other regulations in the chapter governing such *registration area*.[20] Indeed, the regulations began by announcing that only within the registration area is the state to apply conservation and management regulations.[21] The field biologist could have purported to "close" the entire North Pacific Ocean, but his order did not change what Alaska had previously published as the maximum extent of its geographic legal jurisdiction. Thus, the regulations, even with the emergency order, were still fatally defective for vagueness, because the biologist still did not provide the essential element: the boundary for the *registration area*.[21A]

4. The Alaska In Rem Forfeiture Procedure Lacks Due Process Requirements.

There is no procedure in Alaska for in rem civil forfeiture cases. Nor is there any procedure for a prompt post-seizure hearing, bonding, or remission. The entire civil procedure is tersely stated in Alaska Statute 16.05.195 that a vessel and its catch may be forfeited to the state "(2) upon judgment of a court of competent jurisdiction in a proceeding in rem."

18. 5 ACC 34.035(e)(1).

19. 5 ACC 34.090(a).

20. 5 ACC 34.090(b).

21. 5 AAC 34.005(c).

21A. Alaska's crab regulations were amended after the superior court decisions in *Uri III* and *Quinhagak*, *supra*, 5 AAC 34.005(b)(1), to expressly limit the registration area to the three mile limit. The regulation now provides that a registration area is "comprised of all the waters within the statistical area which are territorial waters of Alaska." See App. K.

The court below recognized the seriousness of this question in stating:

> The owners of the AMERICAN EAGLE also complain they were denied due process of law in that the forfeiture statutes under which the vessel, gear, and sale proceeds were seized provide for no in rem procedure or prompt post seizure notice and hearing. *Given this broad deficiency, the owners, in our opinion, have raised a substantial question of whether the* statutory scheme on its face affords adequate procedural due process.

620 P.2d 657, 666, Appendix A at 32. (Emphasis added.)

The court went on to acknowledge:

> [W]hen the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest *the state's reasons for seizing the property must follow the seizure within days, if not hours,* to satisfy due process guarantees even where the government interest in the seizure is urgent. *Stypmann v. City and County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton,* 538 F.2d (2d Cir. 1976).

(Emphasis added.) 620 P.2d at 666-67, Appendix A at 33. These principles are in clear accord with *Barry v. Barchi,* 443 U.S. 55 (1979), where this Court held that a license suspension procedure lacked due process for failure to provide a *prompt* post-suspension hearing.

The Alaska Supreme Court then went on to state that procedural due process had been provided because (1) Alaska Criminal Rule 37(c) provided a method for filing a motion to suppress evidence illegally seized and to obtain its return, and (2) that claimants were in fact provided with procedural due process.

It is clear that there was no prompt post-seizure hearing required under Alaska law and none provided. Alaska Crim-

inal Rule 37(c) expressly does not apply to a civil in rem proceeding.[22] It was not even mentioned in these proceedings as providing the necessary post seizure hearing until the State filed its brief on appeal. It does not require the State to initiate judicial proceedings within a prompt period of time or even within a particular area.

The Washington Supreme Court has uniformly held that a prompt hearing must be provided by statute and that a trial even five weeks after seizure is inadequate. *State v. One 1972 Mercury Capri*, 85 Wn.2d 620, 537 P.2d 763 (1975); *State v. Matheson*, 84 Wn.2d 130, 524 P.2d 388 (1974); *Everett v. Slade*, 83 Wn.2d 80, 515 P.2d 1295 (Wash. 1973). Both South Dakota, in *State v. Miller*, 248 N.W.2d 377 (S.D. 1976), and California, in *People v. Broad*, 12 P.2d 941 (Cal. 1932), hold in accord that the statutes or rules themselves must provide for hearing. *Sensenbrenner v. Crosby*, 306 N.E.2d 413 (Ohio 1974), seems alone in its position that the civil rules provide adequate due process for forfeiture cases. No case, however, supports the view that a criminal rule can be relied upon to provide adequate due process in a subsequently filed civil forfeiture case.

The facts, even as perceived by the Alaska court, show that claimants did not receive the minimum protections required by due process. The AMERICAN EAGLE was seized on January 15, 1976. No complaint was filed for thirteen days, and then the action was brought over 600 miles away from the port of seizure. No procedure for posting bond existed and claimants were compelled to accept the State's assessment of value, which they disputed, in order to obtain the re-

22. Alaska Court Criminal Rule 1. "*Scope*. These rules govern the practice and procedure in the superior court in all criminal proceedings." Appendix I.

lease of their vessel by stipulation, note, and mortage. R. 757-63. Agreement on a stipulation was not reached until February 10, 1976 (R. 775), so the AMERICAN EAGLE was detained for almost four weeks without hearing. These facts contrast strikingly with the requirement of due process, acknowledged by the Alaska Supreme Court, that where the seized property is used by its owner in earning a livelihood, a prompt post-seizure hearing should be provided "within days, if not hours." 620 P.2d at 666-667.

In fact, no hearing in this civil proceeding was held until trial. Trial was first scheduled to begin in March 1977, over a year after the seizure. Claimants appeared prepared for trial but, over their strenuous objection, the case was continued until July 1977 at the State's request, because the State was unprepared. (Tr. 83.) Of course, if the Alaska Criminal Rules had been applicable, Criminal Rule 45 would have required a trial within 120 days of arrest or filing the complaint. (Appendix I.)

As stated, claimants were deprived of their vessel for almost four weeks before agreement on a bond could be obtained. "But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337." *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972). Deprivation of property used by persons to earn their livelihood for any period of time is a substantial deprivation.

Even after release, the AMERICAN EAGLE had to be operated with the additional encumbrance of a second mortgage. Claimants have also been deprived of the proceeds of the catch since the date of seizure. The tying up of funds

alone constitutes irreparable injury. *Commissioner v. Shapiro*, 424 U.S. 614 (1976).

While the integrity of the bond posted was eventually upheld by the Alaska courts, the State of Alaska attempted to renege on its stipulation and reseize the AMERICAN EAGLE after the trial court's initial decision and while this case was still pending. (R. 582, 689, 724.)

The confusion which caused this misdirected state action resulted directly from the lack of any due process procedure under Alaska law, and again unfairly worked to the detriment of the vessel owners rather than the state, which had erred in its understanding of the law by attempting a second seizure. Both the trial court[23] and the Alaska attorney general[24] admitted confusion because of lack of guidance under Alaska law once the bond had been posted.

The court below held that there was no absolute right to a hearing for the purpose of setting a bond or on the question of remission because the two shoreside owners, who were over a thousand miles from the scene and had no knowledge of the charged offenses, were not completely innocent third parties. 620 P.2d at 688, Appendix A at 38-39. The basis for their finding of complicity is that: (1) the shoreside owners, Hansen and Hjelle, shared in the profits of the vessel; (2) Hjelle filed a civil suit in federal court challenging Alaska's jurisdiction outside its territorial waters; and (3) Hansen did the bookkeeping.

There is substantial federal authority holding that a pro-

23. "[T]he statutes of this State and rules of this Court *do not set forth any* procedure to guide this Court or the parties on how a forfeiture is to be carried out. . . ." (R. 733-34, emphasis added.)

24. "The lack of statutory guidance and judicial interpretation on vessel forfeiture in Alaska appear primarily responsible for the superior court's equivocal posture regarding forfeiture." (State Brief, p. 16).

cedure for remission must be available.[25] In a recent decision, the Alaska Supreme Court, in *State v. Rice*, slip op. No. 2321, Apr. 10, 1981, Appendix M at A-202, held that a remission procedure is constitutionally required to afford innocent owners due process of law. (Opinion p. 26.) No such procedure existed at the time the AMERICAN EAGLE case was tried. Rather than considering the applicability of a remission hearing, the court below summarily determined that because claimants Hjelle and Hansen were partners in a lawful fishing venture and would have shared in the profits of the lawful activity, they could not be considered to be truly innocent. Such a finding of guilt by association is constitutionally impermissible. *E.g., Scales v. United States*, 367 U.S. 203 (1961).

Vessel seizures are now a common enforcement measure employed by the State of Alaska. No other case involving these Alaska statutes has ever been tried on the merits. Fishing seasons are short, and loss of use of a vessel for even a few days can mean economic disaster. Bonds may be obtained, if at all, only on the State's own terms. The State of Alaska is in a position to utilize the economic duress inherent in that situation.[26]

The consequences of even a temporary seizure are severe and the absence of a procedure for civil forfeiture cases in Alaska cannot be supported by any state interest. *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

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25. *United States v. One (1) Mercury Cougar*, 397 F.Supp. 1325 (C.D. Cal. 1975); *United States v. One (1) Chevrolet Blazer*, 563 F.2d 1386 (9th Cir. 1977); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977).

26. To increase its leverage, the State of Alaska routinely refuses to negotiate a bond or demands a bond at an unrealistic level, often twice the value of the vessel. (Affidavits of Douglas M. Fryer and William B. Rozell in Support of Petition for Rehearing.)

CONCLUSION

For the foregoing reasons, claimants are entitled to a summary reversal of the decision of the Alaska Supreme Court. Failing summary action, the jurisdiction of the Court is manifest, *Japan Line Ltd. v. County of Los Angeles, supra,* 441 U.S. 434, 440. Therefore, claimants petition the Court to allow submission of briefs on the merits and to present oral argument for their resolution.

DATED: May 29, 1981.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, v. STATE OF ALASKA, Appellee,	File No. 3973 OPINION [No. 2227 - November 21, 1980]
STATE OF ALASKA, Appellant, Cross-Appellee, v. THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, Cross-Appellant.	File Nos. 3974/4023

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kodiak,
Roy H. Madsen, Judge.

Appearances: Douglas M. Fryer, Moriarty, Mikkelborg, Broz, Wells & Fryer, Seattle, William B. Rozell, Faulkner, Banfield, Doogan & Holmes, Juneau, for

Appellant, Cross-Appellee. John G. Gissberg, Assistant Attorney General, Anchorage, Avrum M. Gross, Attorney General, Juneau, for Appellee, Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Stewart, Superior Court Judge. [Boochever, Justice, not participating.]

RABINOWITZ, Chief Justice.
CONNOR, Justice, dissenting.

This case involves an in rem civil forfeiture proceeding brought for alleged violations of Alaska's laws regulating this state's important king crab fishery. On January 15, 1976, the fishing vessel American Eagle was seized by state officials while it was unloading crab in Pelican, Alaska. The seizure was pursuant to AS 16.05.190-.195,[1] for violating various

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[1] AS 16.05.190 provides:

Seizure without warrant and confiscation by court. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of

(footnote 1 continued)

this chapter, or rule or regulation of the department may be seized under a valid search, or all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any persons designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, or other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any.

AS 16.05.195 provides in pertinent part:

Forfeiture of equipment: (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds, taken, transported or possessed contrary to the provisions of this title, or regulation

regulations prohibiting the taking and possession, during closed season, of king crab from the Egg Island district of king crab statistical area "O" in the Aleutian Islands. The vessel's on-board gear and

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(footnote 1 continued)

promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

proceeds equal to $100,677.50 from the sale of crab were also seized. The state subsequently filed a complaint for forfeiture which in its final amended form alleged the following specific violations: taking or possessing king crab out of season as defined by 5 AAC 34.610[2] and Westward Region Emergency Shellfish Orders No. 20 and 23,[3] and prohibited by

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[2] 5ACC 34.610 provides:

FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon September 10 through February 15 unless closed earlier by emergency order, king crab six and one-half inches (165mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab seven and one-half inches (191mm) or greater in width of shell may be taken or possessed.

[3] Westward Region Emergency Shellfish Order No. 20, dated November 4, 1975, reads in pertinent part:

> The present level of catch and rate of fishing success indicate that the desired king crab catch for the Egg

(Footnote 3 continued)

Island district of statistical area O will be attained by 12:00 noon November 7.

The same analysis of data for the Bering Sea (statistical area O king crab fishery indicates that the desired harvest of red king crab will be attained by 12:00 noon November 14.

Therefore, the Egg Island district of area O will close to king crab fishing after 12:00 noon November 7 and the Bering Sea will close to fishing for red king crab after 12:00 noon November 14.

Westward Region Emergency Shellfish Order No. 23, dated November 18, 1975, reads in part:

EMERGENCY ORDER:

5 AAC 34.610. FISHING SEASONS. and 5 AAC 34.635. CLOSED WATERS. and 5 AAC 34.535 CLOSED WATERS. shall be amended to read as follows:

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

5 AAC 34.635. CLOSED WATERS. King crab fishing is prohibited:

(a) after 12:00 noon November 7 in the Egg Island district . . . .

5 ACC 34.098,[4] 5 AAC 34.090(a)[5] and AS 16.10.200[6] on or about January 7, 1976, and taking or possessing king crab out of

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[4] 5 AAC 34.098 provides:

> VIOLATION OF REGULATIONS. It is unlawful for any person to violate any of the regulations of this chapter.

[5] 5 AAC 34.090(a) provides:

> UNLAWFUL POSSESSION OF KING CRAB OR KING CRAB GEAR. (a) it is unlawful for any person to possess unprocessed king crab aboard a vessel licensed as a commercial fishing vessel within any registration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 30(d), sec. 33, or sec. 35(e) of this chapter.

[6] AS 16.10.200 provides:

> Unlawful taking prohibited. It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the Board of Fisheries or in violation of the regulations promulgated by the Board of Fisheries governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

season in violation of 5 AAC 34.090(c),[7] and AS 16.10.210.[8] The vessel was later released for local fishing pursuant to a stipulated order of the parties dated February 10, 1976, in exchange for the posting of a bond by the owners in the amount of $350,000. Trial in this matter

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[7] 5 AAC 34.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within water subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

[8] AS 16.10.210 provides:

> Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner.

was held in the superior court at Kodiak. The court's final order directed forfeiture of the crab sale proceeds and the bond posted for the release of the vessel.

This appeal has been brought by the owners of the vessel, Harold Hansen, Severin Hjelle, and Reidar Tynes, all residents of Washington. The owners allege (1) the state had no jurisdiction to regulate the fishing activities of the vessel beyond the three-mile Alaska territorial waters limit; (2) the reulations which the vessel was alleged to have violated are unconstitutionally vague; (3) the absence of an in rem procedure and a prompt post-service hearing denied the owners due process of law; (4) the trial court erred in admitting statistical evidence relating to crab migration and size; and (5) the trial court erred in awarding attorney's fees to the state.

The state has brought a cross-appeal, alleging that the trial court erred in allowing the owners of the vessel to substitute the $350,000 bond in lieu of forfeiting the vessel. We find no merit in either appeal, and affirm the lower court's ruling.

1. Jurisdiction over the vessel's fishing activities in waters beyond Alaska's three-mile territorial limit.

There is some dispute over whether the American Eagle was operating within or beyond the three-mile territorial limit of state waters when the regulations were allegedly violated.[9] However, assuming

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[9] Testimony at trial showed that on January 2 and January 5 witnesses saw the F/V American Eagle fishing within the closed Egg Island district of king crab statistical area O. On January 7, 1976, Fish and Wildlife officers chartered a vessel and proceeded to the Egg Island district. There they found eight sets of buoys identified as from the F/V American Eagle. One of these pots was pulled. It was baited and contained crabs. On January 16,

(footnote 9 continued)

27 buoys and traps belonging to the vessel were identified south of Akutan Island in the Egg Island district, seven of which matched numbers of the buoys found on January 7. Alaska's territorial waters are defined in 5 AAC 39.975(13):

> (13) "waters of Alaska" means the waters north and west of the International Boundary at Dixon Entrance including those extending three miles seaward
>
> (A) from the coast;
> (B) from lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances;
> (C) from an island or group of islands, including the islands of the Alexander Archipelago, and the waters between the groups of islands and the mainland.

The state, relying on an exhibit in the form of a map which depicts roughly the activity of the American Eagle within the Egg Island district during the 1975-76 season and the location of the buoys, maintains that the violations alleged occurred within three miles of lines extending between headlands or within three miles of groups of islands in the district. However, a state protection officer testified that the pots were found within a circle six and one half miles in diameter, and the state at trial did not attempt to show the location of the alleged violations with more specificity.

the operations were beyone the three-mile limit, we conclude that the state possesses valid authority to regulate crab fishing in these waters. This precise question was decided in State v. Bundrant, 546 P.2d 530 (Alaska), appeal dismissed sub nom. Uri v. State, 429 U.S. 806, 50 L. Ed. 2d 66 (1976), a decision published one week after the American Eagle allegedly violated the law. In Bundrant we upheld the state's exercise of regulatory jurisdiction over crab fisheries beyone the three-mile limit against arguments based on federal exclusivity, preemption, and other doctrines.[10]

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[10] After our decision in Bundrant v. State, 546 P.2d 530 (Alaska 1976), Congress enacted the Fishery Conservation and Management Act of 1976 (FCMA), which provides for federal fisheries management in areas seaward of Alaska's three-mile maritime boundary to a distance of 200 miles. Pub. L. No. 94-265, 90 Stat. 331 (1976), as amended, codified at 16 U.S.C.A. §§ 1801-82 (West, 1979 Supp.). To the extent that there may be a conflict between state fisheries regulations and federal regulations promulgated under the Act,

This power to regulate beyond the territorial boundary, where the crab spend much of their life cycle, was shown in that case to be clearly necessary if the economically and ecologically important migratory crab population within the state's territorial boundary is to be perpetuated. 546 P.2d at 557.[11] Although some of the specific

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(footnote 10 continued)

Alaska's authority to regulate fisheries under Bundrant has been superseded. See 16 U.S.C.A. § 1856 (West, 1979 Supp.) (delineating federal and state jurisdiction in this area). Nevertheless, the events in this case arose prior to the March 1, 1977, effective date of the FCMA and there were no federal regulations applicable to the taking of king crab by domestic vessels in effect at the time. Consequently, we have relied on Bundrant.

[11] The California Supreme Court in People v. Weeren, 607 P.2d 1279 (Cal. 1980), petition for cert. filed, 49 U.S.L.W. 3044 (June 16, 1980), (No. 79-1978), found penal jurisdiction over defendants charged with fishing illegally when the commission of the charged offense occurred outside of California's territorial waters:

> The United States Supreme Court has held that in matters affecting its

(footnote 11 continued)

> legitimate interests a state may regulate the conduct of its citizens upon the high seas where no conflict with federal law is presented. More specifically, the court recognized that a state's interests in preserving nearby fisheries is sufficiently strong to permit such extraterritorial enforcement of its laws enacted for that purpose.
>
> It seem obvious that by adoption and enforcement of its control regulations California seeks to prevent the depletion of a very valuable natural resource. Fish swim. By their very nature they move freely across those arbitrary boundaries which are enacted by governmental entities for official purposes. The commercial and recreational value of California's fisheries are self-evident and are developed, both quantitatively and in their financial aspects, in the record before us. We have no difficulty in discerning in the preservation of its valuable fish population the requisite state interest for extraterritorial enforcement. Furthermore, the state laws here at issue present no conflict with federal swordfish policies because no federal rules in that field have as yet been promulgated under the FCMA.

Id. at 1285-86 (citations omitted).

statutes and regulations questioned in this case differ from those discussed in Bundrant, both cases involve challenges by fishermen who reside in another state to Alaska laws which prohibit the taking or possession of king crab outside the territorial limit of state waters, or the subsequent transport and sale of crab within Alaska waters.[12] We therefore reaffirm Bundrant, as applied to this case.

II. Unconstitutional vagueness of the regulations applied to the F/V American Eagle.

A statute of regulation is impermissibly vague when the "language is so indefinite that the perimeters of the prohibited zone of conduct are unclear," violating rights to due process because the law fails to give adequate notice of

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[12] See notes 2 through 8 supra and State v. Bundrant, 546 P.2d 530, 535 (Alaska 1976).

what type of conduct is prohibited. Marks v. City of Anchorage, 500 P.2d 644, 646 (Alaska 1972). The owners of the American Eagle argue that the regulations which the vessel was accused of violating are unconstitutionally vague because they fail to identify with certainty the area subject to regulation by the state which was closed to king crab fishing at the time of the alleged violations.

Some ambiguity did exist in the applicable regulations, as a result of conflict over the extent of the state's jurisdictional power. In 1968 the Alaska Board of Fish and Game had adopted 5 AAC 36.040, making it unlawful to transport, possess, buy or sell any king crab "taken in violation of the rules and regulations promulgated by the board," if such crab was taken "in any waters seaward of that officially designated as the territorial waters of Alaska . . . ." Hjelle v.

Brooks, 377 F. Supp. 430, 433 (D.C. Alaska 1974); State v. Bundrant, 546 P.2d 530, 533 (Alaska 1976). In 1974, crab fisherman were successful in obtaining a preliminary injunction against the enforcement of this regulation from the federal district court in Alaska. The three-judge panel held that the evidence before the court at that time did not prove a sufficient basis for an extraterritorial regulation applicable only to crab taken beyond the three-mile limit, but confirmed that Alaska could regulate king crab fishing beyond the three-mile boundary if regulations related to a "nexus between its legitimate state interests and its regulation of certain extraterritorial conduct," Hjelle v. Brooks, 377 F. Supp. at 441.[13]

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[13] This language is contained in Judge Wright's majority opinion. Judge Plummer's concurring opinion emphasized that the state bears the burden of proof to establish a nexus for regulating the activity.

In conformity with this decision, the state amended its king crab regulations to the form in existence at the time of the American Eagle's alleged violations. These regulations established statistical areas, each consisting of a "registration area" where state conservation laws would be enforced "to protect and maintain the king crab resources of the state," 5 AAC 34. 005(c) and an adjacent "seaward biological influence zone" where the state would collect information for the development of protective regulations to govern "king crab resources inhabitating waters subject to

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(footnote 13 continued)

377 F. Supp. at 442. Judge Von der Heydt dissented, stating that the evidence before the court was too conflicting to conclude that the plaintiffs were reasonably certain to prevail against Alaska's assertions of an ultimate state interest in regulating crab fishing beyond the territorial limit, and further stating that evidence of the effect of extra-territorial fishing on the crab population and local industry should be considered in assessing the validity of the regulation.

the jurisdiction of the state." 5 AAC 34.005(d). The registration area was defined as "comprised of all waters within the statistical area which are waters subject to the jurisdiction of the state," while the seaward biological influence zone was described as "all waters within the statistical area which are not part of the registration area." 5 AAC 34.005(b). The geographic boundaries of statistical area O, were defined exactly in 5 AAC 34.600. The seaward boundary was designated as the 800-fathom depth contour.[14] The Egg

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[14] 5 AAC 34.600 reads:

Description of Statistical Area.

> Statistical area O has as its eastern boundary the longitude of Scotch Cap light, and as its western boundary 172 degrees W. long., and its seaward boundaries the 800-fathom depth contour, excluding the waters of statistical area Q.

Island district of statistical area O, in which the alleged violations occurred, had its exact boundaries described in 5 AAC 34.605(c).[15] However, nowhere in the regulations was the boundary, if any was intended to exist, between the registration area of statistical area O and the seaward biological influence zone of the same area delineated.

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[15] 5 AAC 34.605(c) states in full:

. . . .

(c) Egg Island district: all Pacific Ocean waters of statistical area O east of the longtitude of Udagak Strait on Unalaska Island (166 degrees 15 minutes W. long.), south of a line from Erskine Point on Unalaksa Is. (53 degrees 59 minutes N. Lat., 166 degrees 16 minutes 45 seconds W. long.) to Jackass Point on Akun Island (54 degrees 06 minutes 35 seconds N. lat., 165 degrees 34 minutes W. long.) then to Avatanak Point (54 degrees 02 minutes 30 seconds N. lat., 165 degrees 17 minutes W. long.), and west of the longitude of Avatanak Point (165 degrees 17 minutes W. Long.) including the waters of Beaver Inlet and Udagak Strait.

Thus, the seaward boundary of the area in which the state intended to enforce its regulations within each statistical area was left unspecified. The intent, according to the state, was for the boundary to extend within the statistical area as far beyond the three-mile limit as state jurisdiction could be justified in a trial on the merits under the Hjelle criteria. The vessel owners argue on the other hand that the only reasonable interpretation of the regulations is that the state intended to regulate only to the three-mile limit, in response to the Hjelle decision. If this was the intention, a phrase such as "territorial waters of Alaska" employed in the pre-Hjelle and post-Bundrant regulations or "waters of Alaska," which defines the state's territorial waters in 5 AAC 39.975(3), would reasonably have been employed, rather than "waters subject to the jurisdiction of the state" utilized in

describing the boundary of a registration area in the version of 5 AAC 34.005(b) adopted after Hjelle. While we disagree with this interpretation by the owners,[16] the ambiguity in the language employed in the regulations is evident.

Regardless of the ambiguity in delineating the registration area, however, the Emergency Orders issued by the state prior to the American Eagle's activities in the Egg Island district left little question that the entire district was closed to king crab fishing as of November 7, 1975. Authorized by AS 16.05.060, Emergency Closure Orders have the force and effect of law.[17] Although 5 AAC 34.035 specifically

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[16] See note 9 supra.

[17] As 16.05.060 states:

Emergency Openings and Closures

> This chapter does not limit the power of the commissioner or his authorized designee, when circumstances require,

authorizes the closure of registration areas, neither its terms nor those of AS 16.05.060 prohibit the closure of an entire statistical area or district thereof.[18]

(footnote 17 continued)

> to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or his authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act.

[18] See note 5 supra. 5 AAC 34.035 provides in part:

> Closure of Registration Areas
>
> (a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.
>
> (b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.
>
> (c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors

Westward Region 1975 Shellfish Emergency Orders Nos. 20 and 23 state unequivocally that the Egg Island district would close to

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(footnote 18 continued)

to the extent there is information available on such factors. Factors which may be considered include:

(1) the effect of overall fishing effort within the statistical area encompassing the registration area;

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab within the area in comparison with preseason expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

(5) the proportion of immature or softshell king crab being handled;

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

5 AAC 34.610 provides:

FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

king crab fishing at noon on November 7, 1975.[19] The boundaries of the Egg Island district, as already stated, are described without ambiguity in 5 AAC 34.605(c) as comprising "all Pacific Ocean waters of statistical area "O" within specified geographic lines.[20] Emergency Order No. 28, dated November 18, 1975, in no way contradicted the earlier orders. Its text states that "[t]hree districts remain open," of which none of those listed was the Egg Island district. Finally, Emergency Order No. 32, dated January 11, 1976, stated that several previously issued emergency orders, including Nos. 20, 23, and 28 "are rescinded effective immediately" because "no longer needed." The

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19 See note 3 supra.

20 See note 15 supra.

order states that the recission is effective only prospectively.[21] Thus the order cannot be interpreted to retroactively authorize crab fishing in the closed Egg Island district such as the American Eagle was alleged to have conducted, and which occurred prior to the

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21 Emergency Order No. 32 reads:

WESTWARD REGION 1975 SHELLFISH FIELD EMERGENCY ORDER NO. 32

JUSTIFICATION:

Westward Region 1975 Shellfish Field Emergency Orders No. 1-31 were issued during the year to regulate the shellfish fisheries of the Westward Region. These remain in effect until rescinded. Some of those are no longer needed whereas others must remain in effect for a time. Therefore, the following emergency order is adopted effective January 11, 1976:

EMERGENCY ORDER:

Westward Region 1975 Shellfish Field Emergency Orders No. 1 through 6 (including 3A) and 8 through 29 (including 17A) are rescinded effective immediately and No. 30 and 31 are rescinded effective March 1, 1976.

effective date of the rescinding order.

We therefore conclude that the closure of the Egg Island district by Emergency order was not "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" in violation of the due process rights of the American Eagle's owners. Stock v. State, 526 P.2d 3, 8 (Alaska 1974). Since the other regulations in question have been amended to eliminate the ambiguities noted in this opinion, after Bundrant clarified the extra-territorial jurisdiction question in favor of the state, there is no need to further

comment on any deficiencies existing in the past.[22]

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[22] The applicable regulations now provide (emphasis added):

> 5 AAC 34.005. STATISTICAL AREAS ESTABLISHED.
>
> . . . .
>
> (b) Each statistical area consists of
>
> (1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and
>
> (2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.
>
> (c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.
>
> (d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and

(footnote 22 continued)

other information necessary for the formulation of comprehensive and effective conservation and management reith sec. 10 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(footnote 22 continued)

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . . .

III. Denial of due process of law in the seizure of the vessel.

The owners of the American Eagle also complain they were denied due process of law in that the forfeiture statutes under

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(footnote 22 continued)

(f) the foregoing provisions of this section are applicable also to closures of districts, subdistricts, section, or any other portion of a statistical area.

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

5 AAC 34.610. FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab six and one-half inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab seven and one-half inches 191 mm) or greater in width of shell may be taken or possessed.

which the vessel, gear, and sale proceeds were seized provide for no in rem procedure or prompt post-seizure notice and hearing.[23] Given this broad deficiency the owners, in our opinion, have raised a substantial question whether the statutory scheme on its face affords adequate procedural due process. The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972). Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d

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[23] See note 1 supra.

452 (1974). However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977); Lee v. Thorton, 538 F.2d 27 (2d Cir. 1976).

We need not reach the question of the constitutionality of the statues [sic] in question in this case, however, because it is apparent that the vessel owners were in fact afforded procedural due process. Jennings v. Mahoney, 404 U.S. 25, 30 L. Ed. 2d 146 (1971); Wiren v. Eide, 542 F.2d 757

(9th Cir. 1976).[24] The seizure of the American Eagle and other property of its owners was pursuant to a judicially

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[24] Wiren acknowledged the old line of United States Supreme Court authority on which the vessel owners rely for the proposition that due process provided as a matter of grace or in court rules does not deprive a litigant of his standing to challenge the failure to require specific procedures in the applicable statute itself. 542 F.2d at 762. See Wuchter v. Pizzutti, 276 U.S. 13, 72 L. Ed. 446 (1928); Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L. Ed. 1027 (1915); Central of Georgia Cy. Co. v. Wright, 207 U.S. 127, 52 L. Ed. 134 (1907); Security Trust and Safety Vault Co. v. Lexington, 203 U.S. 323, 51 L. Ed. 204 (1906); People v. Broad, 12 P.2d 941 (Cal.), cert. denied sub nom. People v. General Motors Acceptance Corp., 287 U.S. 661 (1932). Wiren explained that these past decisions must be read in light of the Supreme Court's more recent self-imposed rules of restraint in deciding constitutional questions. 542 F.2d at 762. See United States v. Raines, 362 U.S. 17, 4 L. Ed. 2d 524 (1960). Jennings was not discussed in Wiren, but held that a person whose driver's license was summarily suspended by an administrative agency could not challenge the validity of the applicable statute, even though the statute's constitutionality presented a "substantial question," where the license suspension had been stayed pending completion of judicial review.

approved warrant issued under Alaska Rule of Criminal Procedure 37.[25] Under this rule's requirements, one of the owners on

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[25] The quasi-criminal nature of forfeiture proceedings under AS 16.05.190-.195 has been recognized by this court in Graybill v. State, 545 P.2d 629, 631 (Alaska 1976). Alaska R. Crim. P. 37 provides in part:

> (b) Execution and Return with Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant.
>
> (1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or
>
> (2) shall leave the copies and the receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or

board the vessel at the time of the seizure was formally notified then of the state's action. The other owners indicated that they in fact received timely notice of the seizure, for prior to the state's filing of a formal civil complaint for forfeiture thirteen days after the vessel was seized, their attorneys mentioned the possibility of suing for release of the vessel. The owners had an immediate and unqualified

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(footnote 25 continued)

> premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
>
> (c) Motion for Return of Property and to Suppress Evidence. A person agrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

right to contest the state's justification for the seizure before a judge under Criminal Rule 37(c).[26] Rather than avail themselves of this opportunity, the owners negotiated the release of the vessel and its gear to local fishing by entering into a voluntary stipulation of a bond with the state; the parties also agreed to have the seized crab sale proceeds placed in an interest-bearing account pending completion of the suit for forfeiture.

We find no merit in the owners' apparent claim that due process requires that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the property upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to

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[26] See note 25 supra.

prevent possible use of the property in further illicit acts. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687, 40 L. Ed. 2d 452, 470 (1974). While Calero-Toledo suggests that due process may require owners of seized property to have a right to its return when they can show they were not aware of or negligent in allowing illegal use of the property,[27] none of

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[27] In Calero-Toledo, the United States Supreme Court upheld the forfeiture of a yacht used to illegally transport marijuana against a claim by its owners for its return, even though the owners had leased the yacht to the persons committing the crime without knowledge that the vessel would be so used. The opinion stated, however:

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent . . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that could reasonably be expected to prevent the proscribed use of the property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-90, 40 L. Ed. 2d at 471-72 (citations and footnotes omitted).

the owners appealing the seizure here have demonstrated that they are completely innocent third parties. Unlike the claimants held entitled to relief from forfeiture in the cases cited by the owners, the three owners of the American Eagle are all active partners in the business enterprise of operating the vessel.[28] They share the profits and risk of loss from its fishing activity. Hjelle skippered another

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[28] Cf. United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (9th Cir. 1977) (case remanded for full evidentiary hearing where court summarily denied a petition for remission under federal forfeiture statute; owner of car alleged he had not known of or condoned the illegal carrying of a gun silencer in the vehicle by his father, and government had not alleged negligence by the owner); United States v. One Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975) (owner loaned her car to boyfriend to pick up passenger at airport and the car was seized when the boyfriend and passenger were arrested for sale of heroin; held violative of due process not to return the car to the owner where record showed she had no awareness of the car's possible illegal use and had done all which reasonably could be expected to prevent the illegal use).

crab-fishing vessel in the Egg Island area while it was open during the season in question, and was one of the named plaintiffs in the Hjelle suit over the jurisdictional authority of the state to regulate crab fishing. Hansen was responsible for keeping records of the American Eagle's operating expenses. Under such circumstances, it is not unduly oppressive to charge Hjelle and Hansen with knowledge and control of the American Eagle's activity, even though they were not on board at the time of the alleged infractions as was co-owner Tynes.

IV. Error in the forfeiture of the bond and sale proceeds ordered by the superior court.

A. Forfeiture of the bond in lieu of the vessel, and failure to order an increase in the bond.

The state in its cross-appeal argues that the superior court erred in allowing the owners of the American Eagle to forfeit

the $350,000 bond they posted, rather than requiring the forfeiture of the vessel itself, or ordering an increase in the value of the bond to reflect a rise in the vessel's appraised value subsequent to the stipulation whereby the vessel was released.[29] The state contends particularly that the superior court erred in relying on the general rules of admiralty law in holding that the stipulated bond served as a complete substitute for the res, thereby limiting the state's recovery to that bond, rather than a form of bail in order to allow for the temporary release of the vessel only. We hold that no error was committed by the superior court in this regard.

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[29] The appraised value of the vessel has apparently increased to approximately $1.3 to $1.5 million, including a federal government mortgage in addition to the equity interest of the appellants.

We look first to the language of the stipulation of February 10, 1976, to resolve this question. We must conclude that by itself the stipulation is ambiguous. The document identifies the vessel and gear as part of the res in the forfeiture action, and requires the owners, "on an order of a court of competent jurisdiction," to deliver the vessel and gear to the Port of Kodiak. It requires the owners to "technically seize" crab pots belonging to the vessel and stored in Alaska waters, acting as "agents" of the state. These provisions indicate an intent by the state to obtain rights to the vessel. However, the document also states that "said release [is] to be final with no right by claimants to return said vessel and relieve themselves of the conditions thereof until a final judgment of this or an appellate court is entered" (emphasis added) and includes as a reason for release "that the

vessel may locally fish," indicating the state's lack of interest in preventing further use of the vessel by its owners.[30]

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[30] The stipulation reads:

STIPULATION

WHEREAS, the State of Alaska is preparing to file a civil complaint for forfeiture and damages in the above-entitled matter (copy attached) and;

WHEREAS, the filing of this forfeiture complaint according to some authorities must be preceded by seizure of the res and;

WHEREAS, part of the res in this case is the fishing vessel American Eagle, a steel-hulled vessel with all her own boat gear valued at approximately $350,000 and;

WHEREAS, this vessel is presently in the custody of the State of Alaska having been seized pursuant to the warrant for search and seizure and;

WHEREAS, part of the res in this case is the number of king crab pots now located near Juneau in Alaska waters and;

WHEREAS, it is agreeable to restore the vessel to claimant so that the vessel may locally fish and collect her crab gear,

IT IS AGREED AND STIPULATED as follows:

(footnote 30 continued)

1. William B. Rozell of Faulkner, Banfield, Doogan & Holmes will enter his appearance for defendants named herein and waive formal service of process of this complaint.

2. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc., Seattle, Washington, by and through counsel William B. Rozell do hereby enter their claim as their interests may appear, to the res to be forfeited in this complaint.

3. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. do hereby agree to retake care, custody and control of the vessel from the State and to hold the State harmless as for any damage which may occur after the time of possession is retaken.

4. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. do hereby agree to act as agent for the State, technically seizing the crab pots of the American Eagle wherever they may be.

5. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree to waive any and all requirements that the State seize said crab pots.

6. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree to execute a promissory note (copy attached) to the State secured by a preferred ship

(footnote 30 continued)

mortgage (copy attached) and to secure endorsement of the policy of insurance on the vessel to the State of Alaska as their interest may appear in the amount of the appraised value of the vessel, unless insurance in this amount is unavailable then in the amount of insurance that can be obtained commercially, keeping said policy in full force and effect for the vessel's full value until relieved by order of this or an appellate court.

7. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree not to remove said vessel and crab pots permanently from the United States or on an order of a court of competent jurisdiction to deliver said vessel and crab pots to the Port of Kodiak in as good a condition as when seized, normal wear and tear excepted.

8. That plaintiff State of Alaska agrees that simultaneously with the filing of the complaint herein that it will move the Superior Court for release of said vessel to claimants subject to the conditions expressed in this Stipulation, said release to be final with no right by claimants to return said vessel and relieve themselves of the conditions thereof until a final judgment of this or an appellate court is entered.

The promissory note for $350,000 executed by the owners as required by the stipulation contains equally ambiguous language, providing "[t]he undersigned

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(footnote 30 continued)

DATED in Anchorage this ___ day of February, 1976.

AVRUM M. GROSS
ATTORNEY GENERAL

By: _____
Gerald W. Markham
Assistant Attorney General

FAULKNER, BANFIELD, DOOGAN & HOLMES

_____
William B. Rozell
of Attorneys for Defendants

ORDER

IT IS ORDERED that the vessel American Eagle presently under seizure be released to the care, custody and control of defendant/claimants subject to the terms expressed in the Stipulation.

DATED this ___ day of February, 1976.

_____
Superior Court Judge

promises to pay the State of Alaska the sum of any fine for forfeiture assessed the vessel American Eagle by a court of competent jurisdiction . . ." and "in the event that the American Eagle is delivered to a port within the State of Alaska . . . [t]his note shall be null and void," but that "[t]he amount due under this note shall not exceed $350,000" and "[t]his note is executed solely for the purpose of providing security to the State of Alaska for any fine or forfeiture which may be assessed. . . ."[31] The stipulation

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[31] The note reads in full:

PROMISSORY NOTE

> The undersigned promises to pay the State of Alaska the sum of any fine or forfeiture assessed the vessel American Eagle by a court of competent jurisdiction arising out of any action now commenced or to be commenced within the next ninety (90) days, arising out of any alleged illegal crabbing activities in which the vessel American Eagle is alleged to have engaged from November 8, 1975

(footnote 31 continued)

until the present in the State of Alaska and that said fine shall be paid the State of Alaska within thirty (30) days after any final judgment is entered or if appeal is taken therefrom within thirty (30) days after entry of a mandate by the appropriate appellate court. The amount due under this note shall not exceed $350,000.

This note shall not be construed as an admission of any liability or as an admission that the American Eagle's owner, skipper and crew separately or collectively have engaged in any illegal activity; or as an acknowledgedment [sic] that the seizure of the vessel American Eagle by the State of Alaska was and is a valid and legal action. This note is executed solely for the purpose of providing security to the State of Alaska for any fine or forfeiture which may be assessed by a court of competent jurisdiction.

In the event a fine or forfeiture is not entered against the American Eagle, or in the event that the authority of the State under which the vessel American Eagle was seized is held invalid by a final order of a court or if appeal is taken, after entry of a mandate by the appropriate appellate court, or in the event that the American Eagle is delivered to a port within the State of Alaska and notice of said delivery is given to the office of the Attorney General of Alaska, or in the event the vessel is totally lost or destroyed by fire, sinking or similar accident covered by

agreement requires the owners to secure insurance on the vessel "in the amount of the appraised value of the vessel" and the promissory note requires the proceeds of the insurance to be tendered to the state in case of loss of the vessel. However, the stipultion agreement recites that the vessel and its gear at the time of the stipulation were "valued at approximately $350,000.[32] While these provisions are consistent with an intent by the state to

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(footnote 31 continued)

> the hull insurance on the vessel and the undersigned's interest in the proceeds of said hull insurance are tendered to the State of Alaska or deposited with the Clerk of the Superior Court or the Clerk of the United States District Court, then in that event this note shall be null and void and in no further force or effect and the State of Alaska will take all steps necessary to release all its right, title, and interest in the vessel American Eagle.

[32] See notes 30 and 31 supra.

retain sufficient security to ensure the return of the vessel itself upon judgment, they also may be interpreted as an understanding between the parties that the bond and insurance provisions would completely satisfy the state's interest in exacting a penalty from the vessel owners if forfeiture was ordered. The state's willingness to release the vessel so that it could continue to be used in local fishing could indicate a lack of resources for storing and maintaining the vessel as well as a decision that the vessel was unlikely to be used in further violations, but these reasons for release can apply equally to the state's concerns either before or after a forfeiture judgment.

It was therefore proper for the trial judge to look to relevant case law, absent explicit guidance in the forfeiture statutes, to interpret the stipulation. Federal admiralty cases have uniformly held

that stipulation agreements for the value of a vessel generally serve as complete substitutes for the res; once posted, they limit recovery to that amount. See United States v. Ames, 99 U.S. 35, 25 L. Ed. 295 (1878); J.K. Welding v. Gotham Marine Corp., 47 F.2d 332 (S.D.N.Y. 1931). Such stipulations constitute an agreement with the court, involving substitution of a chose [sic] in action against the owner in place of the vessel sued in rem. The bond filed becomes the res which alone is sufficient to give the court in rem jurisdiction. J.K. Welding Co. v. Gotham Mining Corp., 47 F.2d 332, 334-35 (S.D.N.Y. 1931). Under the rules of admiralty, once a stipulation for value is posted with the court, the once-seized vessel is free from re-arrest in the same action. See The Shreveport, 42 F.2d 524, 527 (E.D.S.C. 1930). Absent fraud, mistake, or duress, the amount of the stipulation bond will not

be raised even though the value of the vessel increases. United States v. Ames, 99 U.S. 35, 25 L. Ed. 295 (1978).

The state complains that the above cases deal with commercial liens operating under established admiralty rules. However, the same rules have been applied as well to a government forfeiture proceeding against a vessel for transporting contraband. The Ruth, 20 F.2d 314 (3d Cir. 1927). The state also cites admiralty cases in which courts used their discretion to refuse to release vessels on bond absent a stipulated provision for return of the vessels in case forfeiture was upheld. See The Seal, 45 F.2d 243 (S.D. Cal. 1929); United States v. The Memory, 111 F. Supp. 131 (D. Del. 1953). But these cases do not lead to the conclusion that the trial judge here erred in interpreting the ambiguous and conflicting language of the particular stipulation approved in this

case as he did. Limiting the owners' forfeiture liability to the amount of the bond, despite a provision in the agreement for the return of the vessel upon order of the court, is consistent with treating the vessel as alternate security for the bond amount to ensure payment of the promissory note. Finally, the state argues that because the trial court's final order of December 1, 1977, decreed forfeiture of the ship and ordered the vessel's return to Kodiak, forfeiture of the vessel itself was the intention of the stipulation. Under admiralty law, however, the court must decree forfeiture against the vessel before final judgment against the substitute bond is entered. The Ruth, 20 F.2d 314 (3d Cir. 1927). The superior court's later order requiring substitution of the bond for forfeiture of the vessel is in accord with this rule.

The same result is indicated in any event under Alaska case law. Although civil in form, forfeiture actions are basically criminal in nature. Graybill v. State, 545 P.2d 629, 631 (Alaska 1976). As a general rule, forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. One Cocktail Glass v. State, 565 P.2d 1265, 1268-69 (Alaska 1977). The conditions upon which the vessel was voluntarily released by the government are not clear from the stipulation. Furthermore, one of the reasons cited for releasing the vessel, to enable it to return to fishing, is inconsistent with one of the state's justifications for requiring forfeiture of the vessel itself -- preventing further illegal fishing. In this context the better interpretation of the agreement is that in favor of the

owners of the vessel, against whom this more substantial penalty could be assessed.

B. Whether forfeiture of the bond was an excessive penalty.

The owners of the vessel complain, on the other hand, that even forfeiture of the bond was an abuse of the trial court's discretion under AS 16.05.195 to order forfeiture of all, part, or none of the res. See One Cocktail Glass v. State, 565 P.2d 1265, 1271 n.11 (Alaska 1977). They argue that the uncertainty of the law regulating the crab fishery prior to the Bundrant decision mitigated the seriousness of the vessel's offenses. Hansen and Hjelle in addition contend they are being unduly penalized because they were not on board the vessel at the time of the alleged infractions.

Yet the owners admit their awareness of the pendency of the Bundrant appeal

during the 1975-76 season and therefore of the unsettled nature of the jurisdictional question in the courts of this state. We have already concluded that the regulatory scheme in effect gave adequate notice to the vessel's owners of the violations alleged. In this light the stated position of the owners if anything evidences a willingness to deliberately violate existing laws in hopes that they will be declared invalid at a later date. The fact that two of the active partners in the operation of the vessel were not on board when the violations occurred does not relieve them of responsibility for its illegal use, as has already been discussed. The violations alleged involved taking for commercial profit a crucial biological resource of the state, the existence of which depends on careful regulation of harvest. In these circumstances we hold that forfeiture of the bond and crab sale

proceeds was not an abuse of the superior court's discretion.

V. Admissibility of certain state evidence.

In addition to witnesses who testified to seeing the American Eagle in the Egg Island district and finding American Eagle crab pots in that district, the state produced several biologists and fish and game officials who testified regarding differentials in the size, weight, and geographical locations of crab species in statistical area O and introduced into evidence a study on the size and migratory habits of king crab in the Unalaska area. The state introduced this evidence in order to show it unlikely that the crabs seized from the American Eagle came from the Western District of area O, where the vessel owners claimed they were caught, essentially by showing that Egg Island district crabs tend to be distinctly

smaller than those from the Western District and that the crabs seized from the American Eagle were of the size to be expected from the Egg Island district. The vessel owners argue that this evidence should not have been admitted as it is statistically unreliable, due to the limited size and location of the samples upon which some of the statistical conclusions were based and due to alterations in the fish tickets upon which conclusions about the average size of crabs from different districts were based. In addition, the owners claim the superior court erred in refusing to admit new evidence obtained after the trial that smaller crabs could be caught in the Western District.

On review by this court, "[a] trial judge will only be reversed for admitting prejudicial, but otherwise relevant, evidence if he has committed a 'clear abuse of discretion.'" Poulin v. Zartman, 542

P.2d 251, 260 (Alaska 1975), citing Davis v. Chism, 513 P.2d 475, 479 (Alaska 1973). The test of relevancy is whether the evidence has some tendency in reason to establish a proposition material to the case. Alaska R. Evid. 401; Hutchings v. State, 518 P.2d 767, 769 (Alaska 1974). If the evidence is relevant, reversal is appropriate only where its prejudical effect so outweights its probative value that admission constitutes a clear abuse of discretion. Poulin v. Zartman, 542 P.2d 251, 260 (Alaska 1975).

In the instant case the testimony, statistical evidence, and fish tickets admitted by the superior court were relevant to the question of where the American Eagle's crabs were likely to have been caught. Both sides presented their arguments before the superior court regarding the reliability of the evidence prior to its admission. Some question was raised

regarding the statistical validity and accuracy of the evidence. However, the state also substantiated its claims based on its own sampling of crab populations with samples taken from commercial crab catches and interviews with commercial fishermen. Alteration of the fish tickets, in the form of filling in data such as the number of crabs in a catch and the registration area from which the crabs were taken, was justified by the state as necessary when the fishermen and processors required by law to submit such information omitted it. The sources for supplying the omitted information were identified as the fishermen and processors themselves as well as direct measurements of samples from catches and direct observations of vessels. We believe that any deficiencies in the evidence go primarily to its weight rather than its admissibility, and cannot conclude from a review of the record that any of the

evidence was sufficiently misleading to outweigh its probative value and render its admission a clear abuse of discretion. Likewise, we conclude that the additional evidence of smaller crabs caught in the Western District does not sufficiently refute the generalizations regarding crab size reached from the other evidence to indicate that the superior court's refusal to consider that evidence was an abuse of discretion.

VI. Attorney's fees and costs.

We reject the vessel owners' claim that the award of costs and attorney's fees to the state was in error. The superior court awarded the state $55,000, advancing two reasons for its decision: 1) the award "in the discretion of the Court is a reasonable fee" based upon the precedent-setting, complex nature of the case, and 2) the amount awarded approximated 10% of the value of the total judgment against the

owners "but with an additional amount added due to the complexity and novelty of the issues involved." We will interfere with the broad discretion accorded the superior court in awarding attorney's fees only where the award appears to be "manifestly unreasonable." Alaska Placer Co. v. Lee, 553 P.2d 54, 63 (Alaska, 1976). The award in this case is supported by both Civil Rule 82(a)(1), allowing the court to award the percentage of any money judgment indicated by the statute "[u]nless the court, in its discretion, otherwise directs," and Civil Rule 82(a)(2) providing that the court shall base its award on the "amount and value of legal services rendered" "[i]n actions where the money judgment is not an accurate criteri[on] for

determining the fee."[33] Awarding $55,000 in fees, regardless of its relationship to the judgment against the vessel owners, is not "manifestly unreasonable" in our opinion for complex litigation which extended for over two years.

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[33] Alaska R. Civ. P. 82(a) states:

> (a) Allowance to Prevailing Party as Costs.
>
> (1) Unless the court, in its discretion otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

The vessel owners claim they should be entitled to the "public interest" exception to the normal award of attorney's fees to the prevailing party. See Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975); Gilbert v. State, 526 P.2d 1131 (Alaska 1974). This case is basically a dispute between the state and three individuals, concerning valuable private property seized for violating state laws regulating a commercial enterprise. The

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(footnote 33 continued)

> Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.
>
> (2) In actions where the money judgment is not an accurate criteri[on] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.
>
> (3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

substantial economic interest at stake is not of the type which is protected by the "public interest" exception, so we find no merit to this argument by the owners.[34]

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[34] We faced a similar issue regarding attorney's fees on appeal in Thomas v. Bailey, 611 P.2d 536, 539 & n.9 (Alaska 1980):

> In determining the amounts of attorney's fees on appeal in public interest litigation, we believe that the same considerations are applicable as at the trial level. When a sufficient public interest in involved, it is therefore appropriate to award full attorney's fees on appeal to a successful public interest litigant. At times, such a decision may depend upon a balancing of the public and private interests involved in pressing the litigation.
>
> We have utilized such a balancing test in determining whether attorney's fees should be assessed against an unsuccessful party claiming to have litigated a question of public interest. Where the sums at stake in the controversy are sufficiently large to prompt suit regardless of the public interest, an award of attorney's fees against the losing party has been found reasonable. In such cases, the concern that fear or expense will significantly deter citizens from litigating questions of general

We find the owners' other contentions, that an award for attorney's fees above and beyond the res forfeited in the action is barred, and that certain costs granted to the state in addition to the attorney's fees award should not have been allowed, to be equally without merit.[35]

(footnote 34 continued)

> interest to the community is inapplicable. Similarly, questions which primarily affect the private rights of the parties before the court lack the requisite public character to prohibit an award, even if some public or constitutional issues are involved. [citations omitted] [footnote integrated into text]

[35] The owners claim that the state should not have been allowed to claim any costs because notice of the date of the hearing on the costs bill was not timely served as required by Alaska R. Civ. P. 79(a). However, the assistant attorney general called the owners' attorney within the ten-day period, offering to set a mutually convenient hearing date, which offer was refused. This is sufficient compliance with Alaska R. Civ. P. 79(a)'s requirement that notice of the hearing date be served "together with" the costs bill within the ten-day period.

The ruling of the court below is AFFIRMED.

CONNOR, Justice, dissenting.

I dissent for the same reasons which I stated in my dissenting opinion in State v. Bundrant, 546 P.2d 530 (Alaska 1976). See also my dissent in State v. Sieminski, 556 P.2d 929, 935 (Alaska 1976).

In my view, the state does not have jurisdiction beyond the three mile limit. This proposition is strengthened by Congress' action in setting up fisheries management controls in the area outward from the three mile limit. Any regulatory activities of the state in the area outside the three mile limit would have to be accomplished under the aegis of federal authority.

(footnote 35 continued)

The owners also object to the award of costs for plane fare for an out-of-state witness. This cost is explicitly allowed in lieu of in-state mileage by Alaska R. Admin. P. 9(b).

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 38 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, Cross-Appellee Appellee, v. STATE OF ALASKA, Appellee, Cross-Appellant Appellant.	File No. 3973, 3973, 3974, 4023 MANDATE

TO: Superior Court of the State of Alaska, Third Judicial District at Kodiak.

The F/V American Eagle ADF&G No. 38 and $100,677.50 representing the proceeds of 143,825 lbs. of Alaska King Crab Delivered pursuant to ADF&G Fish Ticket Nos. E95626 and E95627 filed an appeal from certain orders of the Superior Court, Third Judicial District at Kodiak in Civil action no. 76-16023 entitled, "STATE OF ALASKA, Plaintiff vs. THE F/V AMERICAN EAGLE, ADF&G

NO. 38 and $ 100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs of ALASKAN KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO'S E95626, E95627, Defendants". The State of Alaska Cross-appealed from the same orders. The State of Alaska appealed from certain other orders of the Superior Court. The case was heard by this court on October 16, 1979. On November 21, 1980, the court filed its written opinion. Appellant's The F/V American Eagle petition for rehearing was denied by this court on March 4, 1981.

IT IS ORDERED:

The orders of the Superior Court, entered December 1, 1977, February 9, 1978 and March 30, 1978, respectively, are affirmed.

Appellee State of Alaska shall recover from Appellant's The F/V American Eagle attorney fees of $ 500.00.

Entered by direction of the Court and pursuant to Appellate Rule 507 at Anchorage, Alaska, on March 5, 1981.

CLERK OF THE SUPERIOR COURT

SEAL

s/
Robert D. Bacon

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, et al.,	)	
	)	Supreme Court
Appellants,	)	Nos. 3973/
	)	3974/4023
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Appellee,	)	
	)	

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Stewart, Superior Court Judge. (Compton, Justice, not participating.)

On consideration of the petition for rehearing filed December 22, 1980,

IT IS ORDERED:

The petition for rehearing is denied.

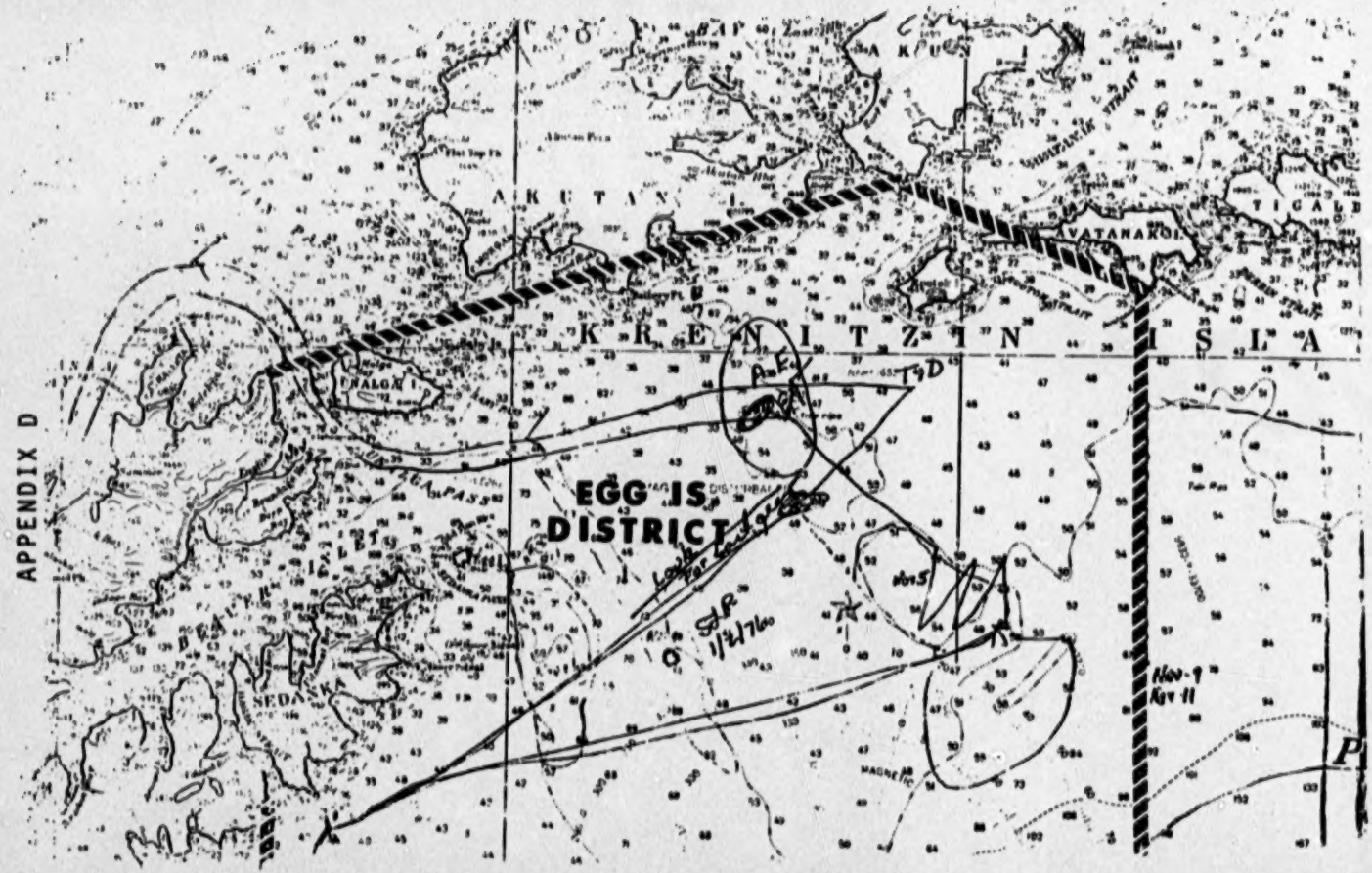
Entered by direction of the court at Anchorage, Alaska on March 4, 1981.

CLERK OF THE SUPREME COURT

s/
ROBERT D. BACON

ccs: Justices
Counsel

APPENDIX D


AKUTAN I.
KRENITZIN ISLA
EGG IS.
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VATANAKOI
SEDANKA
BEAR PASS
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APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. of ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, vs. STATE OF ALASKA, Appellee,	File No. 3973 3973 (No. 2227 - November 21, 1980
STATE OF ALASKA, Appellant/Cross-Appellee, vs. THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. of ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO'S E95626, E95627, Appellee/Cross-Appellant.	File Nos. 3974/4023

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE, and notice is hereby given, that claimants-appellants

Severin Hjelle, Reidar Tynes, and Harold Hansen hereby appeal to the Supreme Court of the United States from the final judgment of this court dated November 21, 1980 affirming the judgment of the trial court, from the order denying the petition for rehearing dated and entered March 3, 1981, and from the mandate dated and entered March 4, 1981, and from the whole thereof.

This appeal is taken pursuant to Title 28, U.S.C. § 1257(2).

The clerk will please certify and transmit the entire record to the Supreme Court of the United States.

The following are questions presented by this appeal:

1. Whether the jurisdiction of the State of Alaska is limited to three miles from shore and any sovereignty beyond that point is vested exclusively in the federal government.

2. Whether the federal government has exclusive jurisdiction of the resources of the continental shelf, including crab.

3. Whether the State of Alaska is prohibited from assuming jurisdiction over international waters.

4. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska's territory.

5. Whether the Alaska statutes and regulations are impermissibly vague and their enforcement denied claimants due process of law.

6. Whether claimants were denied due process by the absence of any in rem procedure under Alaska law and the failure of Alaska law to provide a prompt post-seizure hearing.

7. Whether enforcement of Alaska law as to king crab outside Alaska territory and attempted enforcement under

impermissibly vague statutes and regulations is violattive of the Supremecy Clause, Article VI, Clause 2. The Commerce Clause, Article I, § 8, and the Due Process Clause, Fourteenth Amendment of the Constitution of the United States.

DATED this 1st day of April, 1981.

s/
DOUGLAS M. FRYER, of Moriarty, Mikkelborg, Broz, Wells & Fryer

s/
WILLIAM B. ROZELL, of Faulkner, Banfield, Doogan & Holmes

Attorneys for Appellants and Appellee/Cross-Appellant.

PROOF OF SERVICE

I, DOUGLAS M. FRYER, one of the attorneys for Appellants and Appellee/ Cross-Appellant herein, a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1981, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on the several parties thereto as follows:

On the State of Alaska by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to

John G. Gissberg
State of Alaska
Department of Law
420 L Street, Suite 100
Anchorage, AK 99501

s/_____
DOUGLAS M. FRYER, of Moriarty, Mikkelborg, Broz, Wells & Fryer

APPENDIX F

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA Plaintiff, vs. THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 Representing the Proceeds of 143,825 lbs. of Alaska King Crab Delivered Pursuant to ADF&G Fish Ticket Nos. E95626, E95627, Defendants.	NO. 76-16023

O R D E R

This matter having come on before the Court for hearing on Costs, Award of Attorney Fees, Delivery of Vessel, Motion to Vacate Stipulation for Value, and Motion for New Trial, the Court having heard and considered arguments of counsel and having read and considered counsel's briefs on the law and having reviewed the Stipulation for Value and other documents filed herein and being fully advised in the premises,

IT IS ORDERED that the Motion for New Trial and to Vacate Stipulation for Value, be and they are hereby denied.

That the Motion for Delivery of Vessel, Award of Attorney Fees and Costs are granted as follows and for the reasons stated.

Costs are allowed in the amount of $3,640.67 as set for below:

1.	Publication of Notice of Forfeiture	$196.00
2.	Deposition of Dexter Lall:	
	a. Burton & Wilkerson-- preparation of deposition	$167.00
	b. Filing fee for deposition	32.00
3.	Copy of Deposition of James Brooks by Taku Reporters	$ 87.22
4.	Deposition of John Ploeger by Burton & Wilkerson	$ 85.00
5.	Deposition of Collin Martins	
	a. Burton & Wilkerson	$ 89.00
	b. Mr. Martins' travel	$ 73.82
6.	WITNESS STEPHEN BRUNDAGE	
	a. Travel (Airplane Fare)	$696.53
	b. Per Diem (2-1/2 days)	$ 52.50
	c. Witness Fees	$ 15.00

7.	WITNESS DUANE PHINNEY:	
	a. Travel (Airplane Fare)	$293.00
	b. Per Diem (5 days)	$105.00
	c. Witness Fees	$ 30.00
8.	WITNESS JAMES NURRKA:	
	a. Travel (Airplane Fare)	$472.60
9.	WITNESS LARRY EDFELT	None
10.	WITNESS PAUL TATE:	
	a. Travel (Airplane Fare)	$472.62
	b. Per Diem (8-3/4 days)	$183.00
11.	WITNESS IVAN FROHNE:	
	a. Travel (Airplane Fare)	$249.16
	b. Bus Fare in lieu of Mileage	$ 6.00
	c. Per Diem (5 days)	$105.00
12.	WITNESS JAMES NUTGRASS:	$ 90.00
13.	TELEPHONE BILL	$ 39.14
		$3640.67

Attorney fees are awarded in the amount of $55,000, which in the discretion of the Court is a reasonable fee to be allowed based upon the fact that this case represents a case of first impression in the Courts of Alaska, there were numerous issues to be resolved, much testimony was adduced of an unusual nature, and the case involved several novel points of law on

which there is no clear precedent and therefore from an attorney's standpoint would be unusually lengthy and sometimes complicated. This fee is based upon the further fact that the Court feels and as hereafter stated recovery will and should be limited to the amount of the Stipulation for Value and of the value of the crab represented by the fish tickets for the seized crab and therefore approximates 10% of such value but with an additional amount added due to complexity and novelty of the issues involved as herein stated.

Since the res which is the subject of the forfeiture in this action is a registered, documented vessel of the United States and since the statutes of this State and rules of this Court do not set forth any procedure to guide the Court or parties on how a forfeiture is to be carried out, it is necessary to look to procedures of a similar nature in other

Courts. The most well-established are those of Admiralty in the Federal Courts and the authority there seems to be that when a Stipulation for Value is entered into by the parties and approved by the Court, it takes the place of the vessel for the purposes of the libel and that the vessel cannot thereafter be rearrested for the same cause of action. That the Stipulation for Value is a "complete" substitution for the res. J. K. Welding Co. v. Gotham Marine Corp. or "The New England" case 47 Fed. 2d 332 (335) S.D. NY 1931; U.S. v. Ames 25 Law. Ed. 229; 99 U.S. 35 1878; Sellick v. U.S. 20 Fed. 2d 314 (315), "The Ruth" case Civ. Court of Appeals 3rd Civ. 1927 and in "The John Cadwalader" case 42 Fed. 2d 781, E. D. Penna. 1930. "It nonetheless, however, remains true that the filing of the stipulation in a required sum is a purchase of the freedom of the vessel. Ordinarily that freedom should thereafter be undisturbed".

Here, the Stipulation for Value appears to have been intended to represent the Claimant's equity in the vessel at the time of the seizure, it contains no provision for a reappraisal at a later date or for a recomputation of the equity in the future as payable to the U.S. Government are made to reduce the amount of the preferred mortgage on the vessel, and presumably was entered into in good faith by the parties on both sides, dealing at arms length and specifically limits the Claimant's liability to $350,000.00. To now agree, as the State is asking this Court to do, that the vessel be reappraised and the Claimant be required to increase the amount of the stipulation or deliver the vessel for forfeiture would have the effect of increasing their liability from $350,000.00 by the amount of any principal payments made and any appreciation in value of the vessel, on the one hand, or to

accede to the State's demand for forfeiture which would increase the limit of their liability to the value of their equity plus the balance due to the U.S. Government on the preferred mortgage, and which according to the estimates of the State could amount to a total of $1.3 to $1.5 million dollars. This would be unconscionable!

IT IS THEREFORE ORDERED that pursuant to the Findings of Fact, Conclusions of Law and Memorandum Decision and Opinion entered herein on the 1st day of December, 1977, the vessel F/V American Eagle with all her onboard gear and the proceeds of fish tickets E95626 and E95627 be and the same are hereby forfeited to the State of Alaska and the Claimants have twenty (20) days in which to make payment to the extent of

their liability before Judgment may, on the Motion be entered on the bond for the amount therein stated.

DATED this 9th day of February, 1978 at Kodiak Alaska.

s/
ROY H. MADSEN, SUPERIOR COURT JUDGE

CC: All parties

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA Plaintiff, vs. THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 Representing the Proceeds of 143,825 lbs. of Alaska King Crab Delivered Pursuant to ADF&G Fish Ticket Nos. E95626, E95627, Defendants.	NO. 76-16023

FINDINGS OF FACT, CONCLUSIONS OF LAW
MEMORANDUM OPINION AND DECISION

This is civil action for the forfeiture of the F/V American Eagle together with all her on-board equipment at the time of her seizure and the proceeds of fish tickets E 95626 and E 95627 which represent a catch of King Crab which was on board at the time of seizure and which is alleged in the Complaint to have been taken by the American Eagle in an area closed to commercial fishing at the time of such taking.

FINDINGS OF FACT

1. The American Eagle with all her on-board gear was seized at Pelican, Alaska on or about January 16, 1976.
2. King Crab which was on board the American Eagle in the approximate amount of 143,825#, represented by Fish Tickets #95626 and E95627 was also seized at that time.
3. Both the vessel and crab were seized pursuant to AS 16.05.190-195 and the Plaintiff is asking that they be forfeited to the State.
4. On or about July 29, 1975 the American Eagle was registered at Unalaska, Alaska for King Crab Registration Area "O" (5AAC. 34.600).
5. On or about December 2, 1975 at Unalaska, Alaska, the American Eagle was registered to fish in the Western District of King Crab Registration Area "O".

6. That by Westward Region Emergency Order No. 20, the Egg Island District of King Crab Registration Area "O" was closed to the taking of King Crab at twelve (12) noon, November 7, 1975.

7. That on or about January 2, 1976 the American Eagle was observed from a U.S.C.G. plane flying Foreign Fisheries Patrol. Said plane passed by the American Eagle at an altitude of 150-200 feet, approximately 150 yards distant on the port side of the vessel. The name of the vessel was observed, the vessel was observed to be fishing, i.e., there were two men on the aft part of the vessel and a crab pot was observed extending part way out of the water. Further, a line of crab pot buoys was seen (approximately ten) extending from N.E. to S.W. to the stern or back of the vessel. That said

sighting was within the Egg Island District of King Crab Registration Area "O".

8. That on or about January 5, 1976 the American Eagle was observed from a Japanese factory stern trawler, the Chikubu Maru, the sighting was called to the attention of a National Marine Fisheries agent on board at the time as the vessel was making its way through some King Crab gear, that the sighting of the American Eagle and a string of crab pot buoys approximately twenty (20) to fifty (50) pots, that another vessel, the Golden Viking, was sighted in the same vicinity and that this sighting took place in the Egg Island District of King Crab Registration Area "O".

9. That on January 7th a vessel and King Crab gear were observed in the Egg

Island District by a plane which sighting was reported to Fish and Wildlife Protection. Fish and Wildlife Protection chartered a vessel which proceeded to the Egg Island District from Dutch Harbor. Fish and Wildlife Protection Officers on board observed lights of three vessels, which lights were extinguished. Eight sets of buoys marked American Eagle and #39, the registration number of the American Eagle, were observed, all in the Egg Island District. One pot was pulled and found to be baited, fishing and with live King Crab in it.

10. That the King Crab fishery is a highly sophisticated operation, the vessels such as the American Eagle being 80 feet or more in length and being equipped with sophisticated electronic equipment such as two radars, two or

more radios, depth finders, loran, etc.

11. That although crab fishing is a highly lucrative business requiring modern and sophisticated vessels and electronic equipment and crab pots generally cost several hundred dollars each when equipped with lines and buoys, and skipper of the American Eagle says he lost fourteen (14) in the Egg Island District, he also testified that the did not keep a log indicating where he dropped his pots, how many, nor did he keep records of courses, distances, pot numbers, or pot locations. All he entered in his log were such notations as arrival time at Dutch Harbor, refueling, unloading of crab, departure time. No reference was made in the log to loss of pots or possible location.

12. That there is an identity of interest in the vessels American Eagle and Golden Viking, the skipper of the American Eagle being owner of one-third interest in it and one-half interest in the Golden Viking.

13. That the American Eagle has approximately three hundred (300) pots which are used in the King Crab fishery, some being fished and some being stored in shallow water.

14. That the American Eagle was in the Egg Island District about three (3) days in January, 1976, about January 2, 5, & 7th; although it was then allegedly fishing in the Western District.

15. That the trip to the Egg Island District from the Western District, where the American Eagle was allegedly fishing, would have taken about six (6) hours each way and the three trips to the Egg Island District, allegedly

to look for lost pots, would have consumed thirty-six (36) hours of running time. No "lost pots" were found or recovered.

16. That the American Eagle sighted other pots, not their own, in the Egg Island District but did not contact the vessel to whom they belonged, although this is customary procedure when pots are found belonging to other vessels.

17. Although the American Eagle was in the Egg Island District on January 2nd and 5th, they did not see the U.S.C.G. plane nor the Japanese trawler that observed them as referred to in Paragraphs #7 and #8 of these Findings of Fact.

18. That there is a distinct size difference between the crab taken from the Egg Island District and those taken from the Western District; those taken from the Egg Island District averaging

7 lbs. and 155 to 157 MM across the carapace and those taken from the Western District averaging 10 lbs. and 180 MM across the carapace. That there is on the average a 20 - 25 MM or 1-1/2" difference in size and a two to three pound (2 - 3 lb.) difference in weight.

19. That 5,843 crab taken from the American Eagle in Pelican were measured and the average size was 157 MM. That other samplings from the Egg Island District taken, one consisting of 995 crab, average 157 MM and another of 788 crab averaged 157 MM.

20. That samples taken from the Western District of 244 crab averaged 180 MM and another of 92 crab averaged 180 MM.

21. That the American Eagle delivered 127,599 lbs. of King Crab from the Egg

Island District during the period that area was open to fishing and an added 20,186 lbs. which was split between the Egg Island District and the Akun District which crab averaged 7.2. lbs.

22. That on approximately January 16th a Fish and Wildlife Protection Officer surveyed an area south of Akutan Island, where gear belonging to the American Eagle was sighted, specifically twenty-seven (27) buoys with ADF&G #39 and American Eagle on them which were stored in shallow water. Of these twenty-seven (27) buoys, seven (7) of them matched numbers which had been observed by this officer in the Egg Island District on January 7th & 8th and of which was pulled as stated in Paragraph # 9 of these Findings.

CONCLUSIONS OF LAW

Recognizing the fact that forfeitures even when civil in form, are basically criminal in nature (Graybill v. State 545 P2d 629 (631) Alaska 1976, the Court, after having heard and weighing the testimony of the witnesses and the exhibits finds that the State has met its burden by clearly and convincingly proving by a preponderance of the evidence that

(1) The Egg Island District of Area "O" King Crab Registration District was closed to the taking of King Crab at twelve (12) noon, November 7, 1975,

(2) That the F/V American Eagle was used in aid of the violation of Chapter 34 of the Alaska Administrative Code by taking and possessing King Crab within the Egg Island District between January 2 - 7th, 1976, while said district was closed to commercial crab fishing and said taking was prohibited

by 5 AAC 34.098, 5 AAC 34.090(a) and AS16.10.200,

(3) That the crab so taken are contraband,

IT IS THEREFORE THE ORDER of the Court that the F/V American Eagle with all her on-board gear be and the same is forfeited to the State of Alaska and the proceeds of fish tickets E95626 and E95627 which represent the King Crab caught by said vessel in violation of the Alaska Administrative Code and statutes aforementioned be and they are hereby forfeited to the State of Alaska pursuant to AS 16.05.195.

DATED this 1st day of December, 1977 at Kodiak, Alaska.

s/
ROY H. MADSEN, SUPERIOR COURT JUDGE

APPENDIX C

IN THE TRIAL COURTS FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KODIAK

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KONRAD S. URI,	)	No. 74-12228 Cr. Kodiak
PER NYMARK,	)	No. 74-12231 Cr. Kodiak
ARNOLD RASMUSSEN,	)	No. 74-12217 Cr. Kodiak
RONALD BEIRNES,	)	No. 74-12222 Cr. Kodiak
BORGE H. MANNES,	)	No. 74-12219 Cr. Kodiak
CARL PEROVICH,	)	No. 74-12224 Cr. Kodiak
BJORN NYMARK,	)	No. 74-12221 Cr. Kodiak
SVERRE A. YRI,	)	No. 74-12230 Cr. Kodiak
OLE HENDRICKS,	)	No. 74-12233 Cr. Kodiak
SIGMUND ANDREASSEN,	)	No. 74-12232 Cr. Kodiak
CORY A. KALDESTAD,	)	No. 74-12274 Cr. Kodiak
MICHAEL LYNCH, JR.	)	No. 74-12218 Cr. Kodiak
LARS MYHRE,	)	No. 74-12234 Cr. Kodiak
THOMAS HAUGAN, AND	)	No. 74-12220 Cr. Kodiak
EMIL VINBERG,	)	No. 74-12247 Cr. Kodiak
	)	
Defendants.	)	
	)	

MEMORANDUM DECISION AND
ORDER OF DISMISSAL

This matter having come on regularly before the court for hearing the 16th day of February, 1977, on Defendant's Motion for Dismissal on the grounds and for the reasons that the regulations herein sought

to be enforced against these Defendants are unconstitutionally vague, Plaintiff appearing by and through its attorneys, Gerald W. Markham and John G. Gissberg, and Defendants appearing in person and with their attorneys, William B. Rozell and Douglas M. Fryer, and the Court having read and considered the briefs on the law and having listened to the arguments of counsel and being fully advised in the premises finds:

I. That each of the Defendants is charged essentially with: 1) taking crab during a closed season; 2) unlawful possession of crab; and 3) unlawful possession of crab pots;

II. That the following regulations and statutes must be construed or to some degree pertain to the interpretation of the offenses charged and/or the State's authority therefor:

A. 5 AAC 34.005 Statistical Areas
B. 5 AAC 34.090
C. 5 AAC 34.975(13)
D. 5 AAC 34.010
E. 5 AAC 34.035 Closure of Registration Areas
F. 5 AAC 34.095(a)(1)
G. 5 AAC 34.085(a)(3)
H. 5 AAC 34.095 Unlawful Possession of King Crab Pots
I. 5 AAC 34.100,200,300,400,500, 600,700,800
J. 5 AAC 34.900 Statistical Area Q
K. 5 AAC 34.910 Fishing Seasons
L. Emergency Regulations Amending 5 AAC 34.910 Adopted 6/25/74
M. AS 16.05.920
N. AS 16.10.200
O. AS 16.10.180
P. AS 16.10.190

III. 5 AAC 34.005 establishes "Statistical areas" for the King Crab Fishery consisting of (1) a "registration area" comprised of all the waters within the statistical areas which are subject to the jurisdiction of the State; and 2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area <u>which are not part of the registration area</u>.

Waters of Alaska re defined as those extending three miles seaward in 5 AAC 39.975(13) and International waters are defined as those outside Alaska's three-mile limit in 5 AAC 36.010. It is undisputed that the Board of Fish and Game had the authority to promulgate rules and regulations necessary to conserve crab existing within the State even though such rules would regulate the taking of crab outside the State's borders. State v. Bundrant, 546 P.2d 530; AS 16.10.190. The only limitations on such regulations of extra-territorial activity was that the prohibited conduct was to be based on conservation principles inherent on the resources migratory characteristics and not based on "artificial boundaries or political circumstances".

An examination of the description of areas AD to P reveals in each instance a clearly defined area which terminates to

the seaward at a specified depth curve, and, therefore, these described areas are easily located.

The description of Area Q, however, has no seaward termination point; rather, it extends throughout or covers the whole of the Bearing and Chukchi Seas, and indeed as argued by the State before this Court, extends from the Alaskan shore to those of Siberia.

Now, in examining 5 AAC 34.005, it appears that the statistical areas as described includes "registration areas" and "the adjacent biological influence zone". The regulation 5 AAC 34.035, which authorizes the closing of registration areas, does so in each registration area so it would appear that in order to determine where a season is opened or closed, one must be able to identify the registration area to which that particular opening or closing applies.

This is where Statistical Area Q becomes vague. Where within that area is the "Registration Area"? Where is the season opened or closed? Where is the line of demarcation? Does it extend 3 miles? 30? 60? 100? 200? or as the State has argued, does it have no boundary except the shores of a foreign country bounding the opposite side of the Sea? The crucial question before the Court is whether it is clear and unambiguous, or, as the Defendants have argued, vague? I would have to agree with the Defendants that the language is vague and imprecise; and the description of the area to be delineated uncertain to the point where the regulation can be enforced at the whim and fancy of the enforcement agent, according to that individual's interpretation. As our Supreme Court stated in Theodore v. State, 407 P.2d 182:

> a vague, imprecise, indefinite, or ambiguous regulation, the breach of which carries a criminal penalty, should be strictly construed in favor of the accused.

I find that Statistical Area and Registration Area are not synonymous terms; a Statistical Area "encompasses" a Registration Area and, in addition thereto, also encompasses an adjacent seaward biological influence zone, which is "not" a part of the registration area.

I further find that 5 AAC 34.035 governs the opening and closing of fishing seasons in Registration Areas only, not in statistical areas; therefore, Registration Areas should be specifically described or 5 AAC 34.035 should be amended to apply to the opening and closing of seasons in "Statistical Areas".

For these reasons, I find that as in Wacek v. State, 530 P.2d 751, these defendants were denied due process of law in that

inadequate notice was given by 5 AAC 34.900 delineating the "Registration Area" in Statistical Area Q to which the season in 5 AAC 34.910 Emergency Closing was to apply; and, therefore, the Complaints as to these defendants are hereby dismissed.

DATED at Kodiak, Alaska, this 28th day of February, 1977.

ROY H. MADSEN
SUPERIOR COURT JUDGE

cc: Gissberg
Markham
Rozell
Fryer
Dept/P.S.
AST

APPENDIX H

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
The F/V QUINHAGAK, a white crab vessel bearing Alaska Department of Fish and Game (hereinafter ADF&G) No. 3645, together with all her onboard equipment, a fish ticket bearing ADF&G No. E-52031 representing 56,361 lbs. of KING CRAB, CORY A. KALDESTAD and GOLDEN NORTH FISHERIES, INC.,	)
	)
Defendant.	)
	)

No. 74-16253 H

MEMORANDUM DECISION AND ORDER OF DISMISSAL

Defendant's Motion to Dismiss having come on regularly before the Court for hearing, the Court having considered the memorandums of the parties and being fully advised in the premises finds:

This is an action for forfeiture of the proceeds of crab represented by a fish ticket bearing ADF&G No. E-52031, pursuant to the provisions of A.S. 16.05. 195.

The facts through which this action arose are essentially the same as those under which certain criminal actions were filed entitled State of Alaska vs. Uri, et al 74-12223 Cr. - Kodiak, which cases were dismissed by Order of this Court dated February 23, 1977.

The reason stated for the dismissal being that the definition of Statistical Area Q, i.e. 5 AAC 34.900 is vague and

imprecise and the description of the area to be delineated uncertain to the point where the regulation can be enforced at the whim and fancy of the enforcement agent, according to that individual's interpretation.

Although this is a civil action, our Supreme Court has held that "forfeiture actions are considered penal in nature and therefore like other penal statutes they should be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed." One Cocktail Glass, etc. Op. #1437, 6-8-77; Grayhill v. State 545 P2d 629.

The same principles of notice would apply in a civil case as well as a criminal proceeding and, therefore, I find that this action cannot be sustained for lack of due process of law, in that inadequate notice was given by 5 ACC 34.900 delineating the "Registration Area" in Statistical Area Q to which the season in 5 AAC 34.910 Emergency Closing was to apply and, therefore, the Complaint is dismissed.

DATED at Kodiak, Alaska this 25th day of August, 1977.

ROY H. MADSEN, SUPERIOR COURT JUDGE

cc: John G. Gissberg, Asst. A.G.
Phillip J. Eide, Esq.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA,

Plaintiff,

vs.

The F/V QUINHAGAK, a white crab vessel bearing Alaska Department of Fish and Game (hereinafter ADF&G) No. 3645, together with all her onboard equipment, a fish ticket bearing ADF&G No. E-52031 representing 56,361 lbs. of KING CRAB, CORY A. KALDESTAD and GOLDEN NORTH FISHERIES, INC.,

Defendant.

No. 74-16253 H

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DATED at Kodiak, Alaska this 25th day of August, 1977.

ROY H. MADSEN, SUPERIOR COURT JUDGE

cc: John G. Gissberg, Asst. A.G.
Phillip J. Eide, Esq.

APPENDIX I

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND REGULATIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES

Article I, Section 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Article VI, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every

state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Fourteenth Amendment, Section 1

Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL ACTS

Alaska Statehood Act (July 7, 1958)

72 Stat. 339

Sec. 6(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Submerged Lands Act (May 22, 1953)

43 USC § 1301-1315

43 USC 1301(a) The term "lands beneath navigable waters" means--

***

(2) all lands permanently or periodically covered by tidal water up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or

into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

***

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

***

(g) The term "State" means any State of the union;

43 USC 1302. Resources seaward of the Continental Shelf.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources

of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. May 22, 1953, c. 65, Title II, § 9, 67 Stat. 32.

43 USC 1311. Rights of the States--Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said

lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; . . .

***

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional

authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power; . . .

43 USC § 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical

miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a state so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. May 22, 1953, c. 65, Title II, § 4, 67 Stat. 31.

43 USC § 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Outer Continental Shelf Lands Act

(August 7, 1953)

43 USC 1331-1343

43 USC 1331. Definitions

When used in this subchapter--

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

43 USC 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and

power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected. Aug. 7, 1953, c. 345, § 3, 67 Stat. 462.

§ 1333. Laws and regulations governing lands--Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for

the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if

its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

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43 USC 1334. Administration of leasing--Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a)(1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations

conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b) (2) of this

title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of lease; judicial review

(b)(1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335 (b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States (16 USC 1081-1085 [1964]) (Repealed March 1, 1977)

16 USC 1081. Prohibition against fishing in territorial waters; exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the

Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding

any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Historical Note--Transfer of Functions. Secretary of Commerce was substituted for Secretary of the Interior in view of: the

creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the office of Director of such Bureau; transfers of functions, including functions formerly vested in law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R.

Appendix to Title 5, Government Organization and Employees.

16 USC 1085. Definitions

(a) As used in this chapter, the term "Continental Shelf fishery resource" means living organisms belonging to sedentary species; that is to say, organisms, which at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the Continental Shelf, including the following species:

CRUSTACEA

Tanner Crab--Chionoecetes tanneri;
Tanner Crab--Chionoecetes opilio;
Tanner Crab--Chionoecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Stone Crab--Menippe mercenaria;
Lobster--Homarus Americanus;
Dungeness Crab--Cancer magister;
California King Crab--Paralithodes californiensis;
Golden King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maia;

Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Ceryon quinquedens.

MOLLUSKS

Red Abalone--Haliotis rufescens;
Pink Abalone--Haliotis corrugata;
Japanese Abalone--Haliotis kamtschatkana;
Queen Conch--Strombus gigas;
Surf Clam--Spisula solidissima; and
Ocean Quahog--Artica islandica.

SPONGES

Glove Sponge--Hippiospongia canaliculata;
Sheepswool Sponge--Hippiospongia lachne;
Grass Sponge--Spongia graminea;
Yellow Sponge--Spongia barbera.

(b) The Secretary of Commerce, in consultation with the Secreary of State, is authorized to publish in the Federal Register additional species of living organisms covered by the provisions of subsection (a) of this section.

(c) As used in this chapter, the term "fisheries" means the taking, planting, or cultivation of fish, mollusks, crustaceans, or other forms of marine animal or plant life by any vessel or vessels; and the term

"fish" includes mollusks, crustaceans, and all other forms of marine animal or plant life.

(d) As used in this chapter, the term "Continental Shelf" refers (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Fisheries Zone Contiguous to Territorial Sea of United States (16 USC 1091-94 [1966]) (Repealed March 1, 1977)

16 USC 1091. Establishment; fisheries rights

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in

respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

16 USC 1092. Description of boundaries

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

16 USC 1094. State jurisdiction over natural resources and waters

Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States.

FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 (16 U.S.C. § 1801-82 (Effective Mar. 1, 1977)

§ 1802. Definitions

As used in this chapter, unless the context otherwise requires--

(4) the term "Continental Shelf fishery resources" means the following:

COLENTERATA

Bamboo Coral--Acanella spp.;
Black Coral--Antipathes spp.;
Gold Coral--Callagorgia spp.;
Previous Red Coral--Corallium spp.;
Bamboo Coral--Keratoisis spp.; and
Gold Coral--Parazoanthus spp.

CRUSTACEA

Tanner Crab-Chionoecetes tanneri;
Tanner Crab--Chionoectes opilio;
Tanner Crab--Chionecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Lobster--Homarus americanus;
Dungeness Crab--Cancer magister;
California King Crab--paralithodes californiensis;
California King Crab--paralithodes rathbuni;
Gold King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maja;
Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Geryon quinquedens.

§ 1811 Fishery conservation zone

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

§ 1812 Exclusive fishery management authority

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such

species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

Presidential Proclamation, September 28, 1945, Regarding the Continental Shelf

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and

since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another

State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Executive Order No. 9633, 28 Sept. 1945
1945 AMC 1367, 10 Federal Register 12305

TREATIES

Convention on the Continental Shelf (1958)

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species; that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

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Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing

or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

Ratified by United States 1960
Ratified by USSR 1961

ALASKA STATUTES

Sec. 16.05.190. Seizure without warrant and confiscation by court. Guns, traps, nets, fishing tackle, boats, airplanes, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon

conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any. (§ 23 art I ch 94 SLA 1959)

Sec. 16.05.195. Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles,

sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this section

regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

(e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased

the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department. (§ 3 ch 124 SLA 1974)

Sec. 16.10.200. Unlawful taking prohibited. It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the board or in violation of the rules and regulations promulgated by the board governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

Sec. 16.210. Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell,

or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a rule or regulations promulgated by the board governing the taking of migratory fish or migratory shellfish in certain areas designated by the board or the commissioner.

Sec. 16.10.220. Penalties for violation of §§ 200 and 210 of this chapter. A person who violates §§ 200 and 210 of this chapter is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.

REGULATIONS OF THE ALASKA BOARD OF FISH AND GAME

REGULATIONS IN EFFECT NOW AND AT ALL RELEVANT TIMES

5 AAC 36.010. DESCRIPTION OF AREA

The International Water area includes all waters outside Alaska's three mile

limit, i.e., beyond those described in 5 AAC 39.975(13).

5 AAC 39.975(13) . . . "waters of Alaska" means the waters north and west of the International Boundary at Dixon Entrance including those extending three miles seaward:

(a) from the coast;

PRE HJELLE V. BROOKS REGULATIONS

5 AAC 07.760 (REPEALED June 15, 1974) QUOTAS

In the king crab fishery, the fishing season will be closed when, during the period June 15 through March 31, a quota of 23,000,000 pounds of king crab has been taken.

5 AAC 36.040 (REPEALED June 15, 1974). TRANSPORTATION AND POSSESSION OF SHRIMP, SCALLOPS AND KING, DUNGENESS OR TANNER CRABS

It is unlawful to possess, sell, offer to sell, barter, offer to barter, give or transport, purchase or offer to purchase within the state, including the waters of

the state any shrimp, scallops or king, dungeness, or tanner crab taken contrary to or in violation of the rules and regulations promulgated by the board, if said shrimp, scallops or crabs are taken in any waters seaward of that officially designated as the territorial waters of Alaska to a depth of 200 meters, or beyond the limit, to where the depth of the superjacent waters admits of the exploitation of these shrimp, scallops or crabs and for the Kodiak and Cook Inlet areas if said shrimp, scallops or crabs are taken in the following waters:

(1) in Kodiak area, an area bounded by a line beginning at the southern entrance of Imuya Bay near Kilokak Rocks to a point southwest of Chirikof Island at 55°31' N. lat., 156°16' W. long., then east to a point of 55°05' W. long., then northeast to a point east of the Barren Islands at

58°52' N. lat., 148° W. long., then west to Cape Douglas at 58°52' N. lat., 153° 15'30" W. long.;

(2) in the Cook Inlet area, an area bounded by a line beginning at Cape Douglas at 58°52' N. lat., 153°15'30" W. long., then east to a point at 58°52' N. lat., 148°50' W. long., then north to Cape Fairfield on the mainland of Alaska.

POST HJELLE V. BROOKS REGULATIONS
(Adopted June 15, 1974
Repealed June 2, 1977)

5 AAC 34.005. STATISTICAL AREAS ESTABLISHED

(a) For the king crab fishery, there are established the following statistical areas with the following code letters:

Code Letter

AD - the waters specified in sec. 100 of this chapter
E - the waters specified in sec. 200 of this chapter
H - the waters specified in sec. 300 of this chapter
K - the waters specified in sec. 400 of this chapter
LM - the waters specified in sec. 500 of this chapter

O - the waters specified in sec. 600 of this chapter
R - the waters specified in sec. 700 of this chapter
S - the waters specified in sec. 800 of this chapter
Q - the waters specified in sec. 900 of this chapter

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and

fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration, he shall close the registration area by emergency order.

(c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors to the extent there is information available on

such factors. Factors which may be considered include:

(1) the effect of overall fishing effort within the statistical area encompassing the registration area;

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab within the area in comparison with pre-season expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

. . . .

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

(d) Within five days after the closure of any registration area, the owner of any vessel registered for that

area may formally request the commissioner to reopen the area. The commissioner shall personally review pertinent information on the condition of king crab within the area, and shall formally announce his decision within 14 days of the receipt of the request.

(e) After the closure of any registration area, no vessel registered for that area may bring king crab into waters subject to the jurisdiction of the state unless:

(1) the vessel is validly registered for another registration area and the season is open in the area; and

(2) the vessel is otherwise in compliance with secs. 020 and 030 of this chapter.

5 AAC 34.090. UNLAWFUL POSSESSION OF KING CRAB OR KING CRAB GEAR

(a) It is unlawful for any person to possess unprocessed king crab aboard a

vessel licensed as a commercial fishing vessel within any registration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 030(d) of this chapter. This prohibition shall not apply to king crab possessed for subsistence purposes if otherwise consistent with applicable regulations.

(b) It is unlawful for any person to possess aboard a vessel licensed as a comemrcial fishing vessel within any registration area any king crab or any gear (including aggregate amounts of gear) used in the taking of king crab which are prohibited by other regulations in this chapter governing such registration area.

(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within waters subject to the jurisdiction of the

state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.098. VIOLATION OF REGULATIONS

It is unlawful for any person to violate any of the regulations of this chapter.

5 AAC 34.600. DESCRIPTION OF STATISTICAL AREA

Statistical Area O has as its eastern boundary the longitude of Scotch Cap Light, and as its western boundary 172° west longitude, and its seaward boundaries the 800 fathom depth contour, excluding the waters of statistical area Q.

5 AAC 34.605(c).

Egg Island District: All Pacific Ocean waters of statistical area O east of the longitude of Udagak Strait on Unalaska Island (166°15' W. Long.), south of a line from Erskine Point on Unalaska Island

(53°59' N. Lat., 166°16'45" N. Long.) to Jackass Point on Akun Island (54°06'35" N. Lat., 165°34' W. Long), then to Avatanek Point (54°02'30" N. Lat, 165°17' W. Long.), and west of the longitude of Avatanek Point (154°17(W. Long.) including the waters of Beaver Inlet and Udagak Strait.

5 AAC 34.605(e). DESCRIPTION OF DISTRICTS

e. Western District: all Bering Sea waters or statistical area O west of the longitude of Cape Tanak on Unalaska Island and all Pacific Ocean waters of king crab registration area O west of the longitude of Udagak Strait (166EoD16'40" N. Lat., 168°07' W. Long.), to Konets Head on Unalaska Island, (53°19' N. Lat., 176°51' W. Long.)

5 AAC 34.610. FISHING SEASON

King crab may be taken or possessed from 12:00 noon November 1 through February

15 unless the registration area is closed earlier by emergency order.

5 AAC 34.900. DESCRIPTION OF STATISTICAL AREA

Statistical area Q includes the waters of the Bering Sea and Chukchi Sea including all tributary bays except Bechevin Bay and Isanotski Strait (as described in 5 AAC 34.500), north of 54°36' N. lat., (the latitude of Cape Sarichef).

POST STATE V. URI REGULATIONS
(Adopted June 2, 1977)

5 AAC 34.005 STATISTICAL AREAS ESTABLISHED

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone; comprised of all the waters

within the statistical area which are not part of the registration area.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 010 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS. (a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any adjacent seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(f) The foregoing provisions of this section are applicable also to closures of districts, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person:

(1) to take, attempt to take, cause to be taken, or possess king crab;

(2) to operate, attempt to operate or cause to be operated any vessel or gear or to possess any gear; or

(3) to take, attempt to take, cause to be taken, or fail to take any action, in violation of sec. 010(b) of this chapter.

ALASKA COURT

CRIMINAL RULES

Rule 1. Scope.

These rules govern the practice and procedure in the superior court in all criminal proceedings and, insofar as they are applicable, the practice and procedure in all other courts in criminal proceedings. (Effective Aug. 1, 1980.)

Rule 37. Search and Seizure.

(1) A search warrant authorized by law shall issue only on

(i) (aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to

believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified; and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the property is on the person or in the place

to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant.

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made

in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the proeprty was seized or the court in which the property may be used for the return of the

property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant

may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall grant or

deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Effective February 15, 1973.)

Rule 45. Speedy Trial.

(a) Priorities in Scheduling Criminal Cases. The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. Trial dates in criminal cases in the

superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

(b) Speedy Trial Time Limits. A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.

(c) When Time Commences to Run. The time for trial shall begin running, without demand by the defendant, as follows:

(1) From the date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first. The arrest, arraignment, or service upon the defendant of a complaint, indictment, or information, relating to subsequent charges arising out of the same conduct, or the refiling of the original charge, shall not extend the time,

unless the evidence on which the new charge is based was not available to the prosecution at the time the defendant was either initially arrested, arraigned, or served with the original charge, and a showing of due diligence in securing defendant for the original charges is made by the prosecution; or

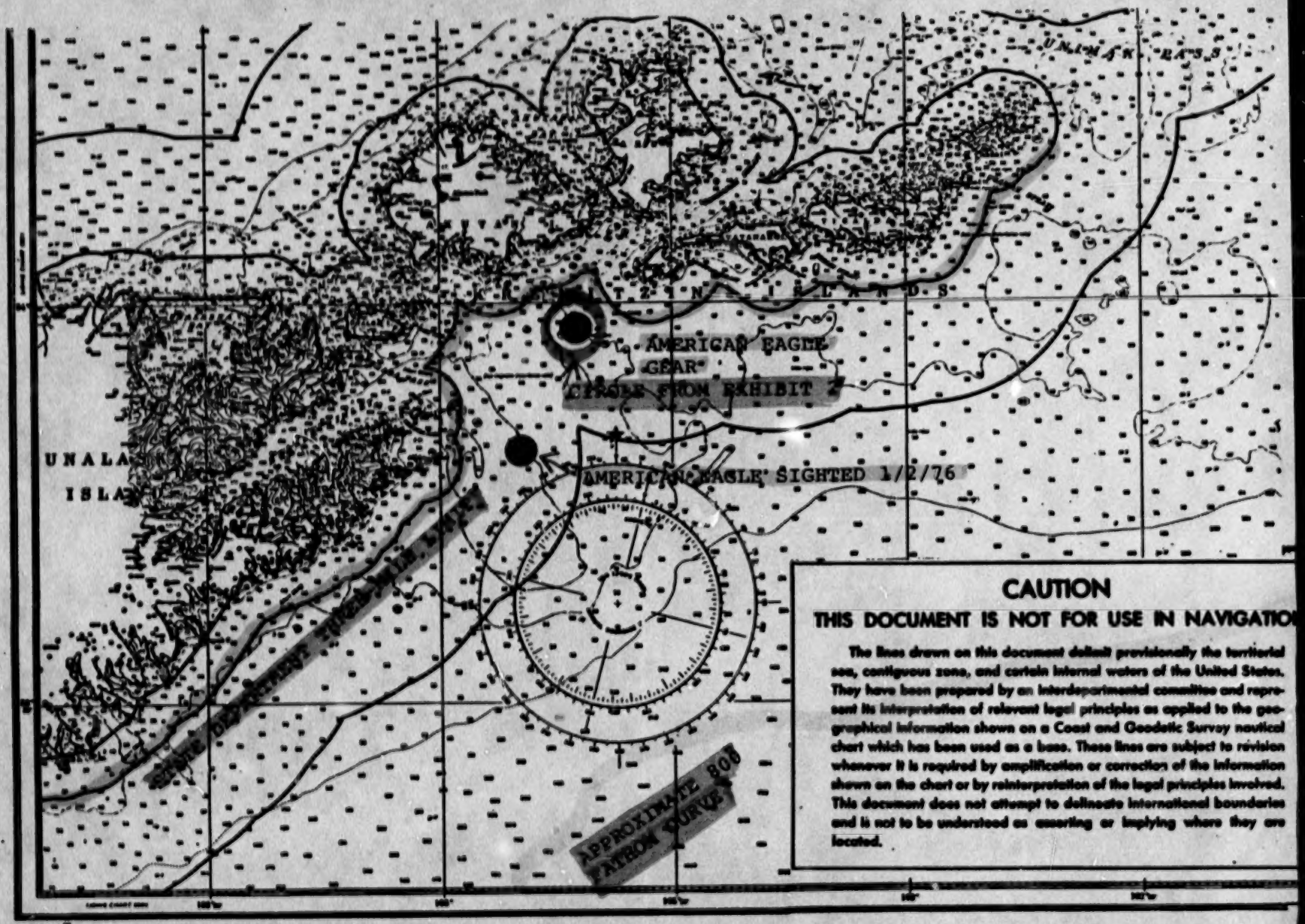
(2) If the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, from the date of mistrial, order granting a new trial, or remand.

(d) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) The period of delay resulting from other proceedings concerning the defendant, including but not limited to

motions to dismiss or suppress, examinations and hearings on competency, the period during which the defendant is incompetent to stand trial, inaterlocutory appeals, and trial of other charges.

APPENDIX J



APPROXIMATE 800 FATHOM CURVE

APPENDIX K

Current (Post Uri) Regulations
(with emphasis added)

5 AAC 34.005

(b) Each statistical area consists of

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and

effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 10 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

Post Hjelle Regulations in Effect January 1976
(with emphasis added)

5 AAC 34.005

(b) Each statistical area consists of:

(1) a registration area comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.010 - [No such regulation in 1976.]

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations

and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all

statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . .

(f) The foregoing provisions of this section area applicable also to closures of district, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize

the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . .

[No such subsection in 1976.]

5 ACC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab 6-1/2 inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab 7-1/2 inches (191 mm) or greater in width of shell may be taken or possessed.

5 AAC 34.091. [No such regulation in 1976.]

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

APPENDIX L

THE SUPREME COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KONRAD S. URI,	)	No. 74-12,223 Cr.
PER NYMARK,	)	No. 74-12,231 Cr.
ARNOLD RASMUSSEN,	)	No. 74-12,217 Cr.
RONALD BEIRNES,	)	No. 74-12,222 Cr.
BORGE H. MANNES,	)	No. 74-12,219 Cr.
CARL PEROVICH,	)	No. 74-12,224 Cr.
BJORN NYMARK,	)	No. 74-12,221 Cr.
SVERRE A. YRI,	)	No. 74-12,230 Cr.
OLE HENDRICKS,	)	No. 74-12,233 Cr.
SIGMUND ANDREASSEN,	)	No. 74-12,232 Cr.
CORY A. KALDESTAD,	)	No. 74-12,274 Cr.
MICHAEL LYNCH, JR.	)	No. 74-12,218 Cr.
LARS MYHRE,	)	No. 74-12,234 Cr.
THOMAS HAUGAN	)	No. 74-12,220 Cr.
EMIL VINBERG	)	No. 74-12,247 Cr.
	)	
Defendants.	)	

MEMORANDUM AND ORDER

The defendants are commercial fishermen charged with having violated regulations of the State of Alaska purporting to govern the harvest of king crab in the Bering Sea. All of these offenses occured, if at all, in "the hole area" some 16 to 60 miles off the coast of Alaska.

The defendants move to dismiss the complaints, contending, in part, that the State of Alaska lacks jurisdiction to regulate the king crab fishery more than three (3) miles seaward of its shores.

At the outset, it is important to note that these cases do not involve the State's jurisdiction to enact and enforce so-called "landing laws". The charges in these cases specifically relate to conduct wholly occurring outside of Alaska's territorial waters.

Despite the disastrous consequences that may be in store for the king crab fishery and a substantial segment of Alaska's fishing community, I am forced to conclude that any attempt, by the State of Alaska, to regulate king crab fishing in the Bering Sea more than three miles from its shores, is in conflict with an area of exclusive federal jurisdiction and, there-

fore, prohibited by Article VI of the Constituion [sic] of the United States.

The Court hereby adopts and incorporates herein by reference, as the basis for its decision, the analysis and authorities cited in part II of defendants' Memorandum in Support of Motion to Dismiss, filed herein on October 2, 1974 (pp. 10-17.

Accordingly, defendants' motion to dismiss the complaints is granted upon the grounds stated. Having reached this conclusion, it is not necessary to decide the other issues raised by defendants' motion.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 17th day of December, 1974.

EDMOND W. BURKE
Superior Court Judge

cc: Rozell
AG (Markham)

THE ATTEMPT BY THE STATE OF ALASKA TO REGULATE THE KING CRAB FISHERY IN THE BERING SEA CONFLICTS WITH AN AREA OF EXCLUSIVE FEDERAL JURISDICTION

While the State of Alaska was given certain proprietary rights within the three-mile belt as a result of the Submerged Lands Act passed in 1953, 43 U.S.C. 1301-15, Congress declared in the Outer Continental Shelf Lands Act, passed the same year, that seaward of the three-mile limit jurisdiction is federal rather than state.[5]

In Section 3 of the Outer Continental Shelf Act, it is stated:

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[5] The Outer Continental Shelf Lands Act was preceded in 1945 with a Presidential Proclamation which stated:

> Having concern for the urgency of conserving and prudently using its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed on the Continental Shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control . . .

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter." 43 U.S.C. 1332(a).

Thus far, it is clear that the state jurisdiction conferred by the Submerged Lands Act terminates at three miles and there federal jurisdiction commences. The Act is also careful to point out in 43 U.S.C. 1332(b) that the

> character as high seas of the water above the Continental Shelf and the right to navigation and fishing therein shall not be affected.

However, with regard to the seabed, subsoil and resources of the Shelf itself, including king crab, the Act creates a federal enclave. It is stated in 43 U.S.C. 1333(a)(1):

> The Constitution and laws and civil and political jurisdiction of the United Staes are extended to the subsoil and seabed of the outer continental shelf and to all artificial islands and fixed structures

> which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state . . .

(Enphasis added)

Subsection (2) of this section provides that the federal officers and courts may enforce the civil and criminal laws of each adjacent state of the United States as of August 7, 1953 on the Continental Shelf. (It is to be noted that the date

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[6] The text of this section was modified during the debate in Congress:

> In the matter inserted in the conference report, the jurisdiction and control of the United States is extended to the seabed and subsoil of the outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version and also the structures for their development such as artificial islands, drilling platforms, etc. Statement of House Manager, 1953 Congressional Record, House, 10419.

of "adoption" of state law precedes the adoption of the quota in this case by 20 years.) Section (3) of the statute goes on to state that:

> The provisions of this section for adoption of State Law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Thus, subsection (2) appears to be something in the nature of a federal assimilative crimes act for the federal enclave for the utilization of the state laws as of August 7, 1953. The regulations here, of course, could not be so assimilated because they did not exist (nor did the State of Alaska exist) as of August 7, 1953.[7]

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[7] An earlier version of the statute did not set a time, i.e. August 7, 1953, as the deadline for the assimilation of state law. It read: "The laws of each coastal State which so provide shall be applicable . . ." 1953 Congressional Record--House 4891. The statute, as passed, read:

Moreover, the statute clearly states that the state is to have no jurisdiction with respect to the "seabed, subsoil and natural resources of the Outer Continental Shelf. Such a statement of exclusive federal jurisdiction could be hardly more clear.

The Department of Justice felt strongly that the Outer Continental Shelf was an area of exclusive federal jurisdiction

7 (cont.)

> The civil and criminal laws of each adjacent state as of August 7, 1953 are declared to be the law of the United States, . . .

There was considerable debate on this point in the Senate on constitutional grounds. Sen. Cordon stated:

> Sec. 4 of the bill takes care of all of those provisions. The enactment as Federal law byreference of the laws so adopted are the laws as they exist at the time of enactment of S. 1901. Only already existing State laws will become the law of the U.S., and amendatory legislation by the States thereafter will not be applicable unless made so by later Federal legislation

1953 Congressional Record--Senate 6964.

in its report to Congress prior to passage of the bill. As Senator Cordon stated to the Senate:

> On the other hand, as pointed out in the report made by the Department of Justice on S. 1901, the area is one in which national and international problems intermingle. The Outer Continental Shelf is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control. The reports submitted on behalf of Attorney General Brownell stresses these two facts.
> The Department of Justice views are set forth in the committee report on S. 1901, Report No. 411, and it is also found in the hearings on S. 1901, along with oral testimony of Mr. J. Lee Rankin, Assistant Attorney General of the United States, which begins on page 625 of the hearings. The report of the Department states in part:
> This--that is, the outer Continental Shelf--is a Federal area, outside State boundaries, and to give the states a sort of extra territorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is

> important that the Federal Government which has the responsibility for handling foreign relations, have the exclusive control of law-making and law enforcement there.

1953 Congressional Record--Senate 6903. In fact, an attempt by way of an amendment to the bill to extend state boundaries to the seaward extremity of the Outer Continental Shelf was rejected by the Senate. 1953 Congressional Record--Senate 7232, 7236.[8] During the debate over the amendment, Senator Cordon succinctly stated:

> Again, that is the heart of the problem before the Senate--one we have discussed over and over again. Either the outer Continental Shelf is territory where the sole jurisdiction, control and right to tax in any form is in the United States or it is not.

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[8] The amendment was proposed by Senator Long. Another amendment proposed by Senator Ellender attempting to allow the states to extend their jurisdiction to the Continental Shelf had been previously rejected. 1953 Congressional Record--Senate 7228--7232.+

Later Senator Cordon again made clear that the Act was to provide for exclusive federal jurisdiction:

> Senator Cordon: The difference between that situation (the Mineral Leasing Act) and the one presented by the Outer Continental Shelf is that, with respect to the Mineral Leasing Act, the lands to which the Act is applicable are within the boundaries of the state and there is a degree of state jurisdiction. With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state. To that extent there cannot be an application of state law under state jurisdiction. The distinction is an important one which the Senator from Oregon would like to have the record show.
>
> Mr. Daniel: I should like to ask one further question. Is it the opinion of the Senator from Oregon that if the Secretary deems it advisable in carrying on this cooperation with the state agencies and officials, facilities and employees as may be made available to him?
>
> Mr. Cordon: Under existing law, yes, but with special regard to the fact that there is no state jurisdiction on the Outer Continental Shelf.

1953 Congressional Record--Senate 10472.

Having established that the jurisdiction of

the federal government is exclusive with respect to the "natural resources" of the Outer Continental Shelf, the question becomes whether king crab are within those "natural resources". The answer that king crab are within the "natural resources" comes from not one but three sources.

First, the Submerged Land Act, of which the Outer Continental Shelf Lands Act is regarded as an amendment, specified:

> The terms "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs . . . and other marine animal and plant life but does not include water power or the use of water for production of power . . .

(43 U.S.C. 1301(e); Emphasis supplied)

Second, in the Convention on the Continental Shelf, which was ratified by the United States in 1960 and by the Union of Soviet Socialist Republics in 1961, it is stated that:

> The natural resources referred to in these articles consist of the mineral

> and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil.

Article 2, Section 4, 1958 Geneva Convention.

Thus, while it might be arguable that the Convention is much narrower than the Submerged Lands Act in defining a "natural resource", crab would meet the definition of the "sedentary species" in that the crab is in "constant physical contact" with the seabed.

Third, this was later made clear by the Secretary of Commerce when he defined as required by 16 U.S.C. 1081 and 1085 the sedentary species of the CContinental [sic] Shelf. This definition was published in Title 50, Code of Federal Regulations, Subchapter J--The Continental Shelf, which states in pertinent part:

Section 295.1 Purpose.

The purpose of the regulations in this part is to list those species determined by the Secretary of Commerce, in consultation with the Secretary of State, to constitute a Continental Shelf fishery resource, i.e., living organisms belonging to the sedentary species, which at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil of the Continental Shelf.

Section 295.2 List of Species.

CRUSTACEA

Dungeness Crab--Cancer magister.
Tanner Crab--Chionoecetes tanneri.
Tanner Crab--Chionoecetes opilio.
Tanner Crab--Chionoecetes angulatus.
Tanner Crab--Chionoecetes bairdi.
King Crab--Paralithodes camtschatica.
King Crab--Paralithodes platypus.
King Crab--Paralithodes brevipes.
California King Crab--Paralithodes rathbund.
California King Crab--Paralithodes californiensis.
Stone Crab--Menippe mercenaria.
Lobster--Homarus Americanus.
Golden King Crab--Lithodes aequispinus.
Northern Stone Crab--Lithodes maia.
Stone Crab--Menippe mercenaria.
Deep-sea Red Crab--Ceryon quinquendens.

The regulations, constituting an attempt to invade an area under exclusive federal jurisdiction, must fail under the

supremacy caluse, [sic] Article VI, Clause 2 of the Constitution of the United States. Campbell v. Hussey, 368 U.S. 297 (1961); Hood v. Du Mond, 336 U.S. 525 (1948); Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed 581 (1941); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

In the Campbell case, state tobacco regulations were struck down even though not inconsistent with federal standards because the federal standards were the "official standards of the United States" and state regulations could not be permitted even as supplemental to those federal standards. In Rice v. Santa Fe Elevator Corp., supra, the court struck down the state regulations in a field which the states have traditionally occupied (warehousing) where the United States Warehousing Act provided that the "power, jurisdiction and authority" of the Secretary of Commerce "shall be exclusive with respect

to all persons."[9] In Missouri Pacific Railroad Co. v. Porter, 273 U.S. 341 (1927), a state statute concerning shipment on bills of lading was struck down as it would not be allowed to be

> . . . in coincidence with as complimentary to or as in opposition to the intention of Congress to enter a field that is within its jurisdiction.

Accordingly, the State of Alaska has no jurisdiction on the Outer Continental Shelf pursuant to the Supremacy Clause, Article VI, Clause 2, of the Constitution of the United States.

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[9] While warehousing licensing with a state might be a matter for traditional local concern and legislation there seems to be no history of regulation outside a state's territories; except of course with respect to State residents. Cf. Skiriotes v. Florida, 313 U.S. 69 (1941).

APPENDIX M

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA Petitioner, v. WILDER S. RICE and CESSNA FINANCE CORPORATION, Respondents.	File No. 4777 OPINION

CESSNA FINANCE CORPORATION Cross-Petitioner, v. STATE OF ALASKA, WILDER S. RICE, and UNITED BANK OF ALASKA, Cross-Respondents.	File No. 4778 [No. 2321-April 10, 1981]

In File No. 4777, Petition for Review from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge, on Appeal from the District Court of the State of Alaska, Christopher Cooke, sitting as District Court Judge.

In File No. 4778, Petition for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, S. J. Buckalew, Jr., Judge.

Appearances: Sarah Elizabeth Fussner, Assistant Attorney General, Anchorage, and Avrum M. Gross, Attorney General, Juneau, for Petitioner/Cross-Respondent State of Alaska. Wilder S. Rice, Anchorage, pro se. James R. Peterson, Burr, Pease & Kurtz, Inc., Anchorage, for Respondent/Cross-Petitioner Cessna Finance Corporation.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Boochever, Justice, not participating.]

RABINOWITZ, Chief Justice.
MATTHEWS, Justice, Concurring.

This petition for review considers important questions concerning mens rea in game regulations and issues of substantive and procedural due process as to security holders in the forfeiture of equipment for game violations.

Wilder Rice, a big game guide, and two clients of his were arrested and charged with killing a moose in violations of game regulations. More particularly, Rice and his co-defendants were charged with allegedly killing a moose the "same day airborne" in violation of 5 AAC 81.070

(b)(6).[1] Rice was also charged with transporting meat taken illegally in violation of 5 AAC 81.140(b)[2] Acquitted on the first charges, Rice was convicted of illegal transportation and sentenced in December 1977 to thirty days in jail, a $500 fine, and forfeiture of a Cessna airplane used in committing the alleged offense.

Rice appealed his conviction to the superior court on several grounds, including contentions that the regulation was

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[1] 5 AAC 81.070(b) provides, in part:

> (b) The illegal methods and means of taking big game . . . are
>
> . . . .
>
> (6) a person who has been airborne may not thereafter take or assist in taking big game until after 3:00 a.m. following the day in which the flying occurred . . . .

[2] 5 AAC 81.140(b) provides, "No person may possess or transport any game or parts of game illegally taken."

void for vagueness and that some form of intent must be implied in the regulation he was convicted of violating. Meanwhile, Cessna Finance, possessing a substantial security interest in the airplane, sought and was granted leave to intervene in the superior court proceedings, to plead violations of substantive and procedural due process in the forfeiture of the airplane without formal notice to it of the sentencing proceeding. The superior court overturned Rice's conviction and vacated the sentence, finding reversible error in the failure of the district court to instruct that the jury must find beyond a reasonable doubt that the defendant knew or should have known the moose meat was illegally taken.[3] The superior court

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[3] Specifically, the superior court stated:

> The court, however, feels that with respect to the question of the instruction as to knowledge under this

also held that constitutional due process requires "that in order to forfeit a third party's interest in this aircraft or in any other particular item, that notice and an opportunity to be heard must be given." The state then filed the instant petition for review.

(footnote 3 continued)

> particular regulation there should have been in instru -- by the plain reading of the regulation it would apply to anyone, however innocent or non-innocent they may be with respect to any knowledge they might have had or whatever steps they had gone through to ascertain whether or not the game in question was illegally [taken]. It could apply equally to Wien or any other person and therefore, because of that, the court is reversing the conviction. That this particular regulation, the way it is written, is not void for vagueness when the jury would be instructed that the particular individual involved who is charged with the crime either knew or should have known that the game in question was improperly taken.

Pursuant to AS 16.05.195[4], the state, on October 16, 1977, also filed a civil

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[4] AS 16.05.195 provides:

> Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state
>
> (1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or
>
> (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was usded in or in aid of a violation of this title or a regulation promulgated under it.
>
> (b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.
>
> (c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of bird taken, tansported or possessed contrary to

action in the superior court for damages against Rice and Reidt (one of the co-defendants) and for forfeiture of the airplane. On November 18, 1977, the state issued a notice of complaint for forfeiture which was sent to Cessna Finance. Cessna later moved for summary judgment on this action, asking, inter alia, that AS 16.05. 195 be held unconstitutional as violating

---

(footnote 4 continued)

> the provisions of this title or a regulation promulgated under it.
> (d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.
> (e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.
> (f) An item forfeited under this section shall be disposed of at the discretion of the department.

due process. The superior court denied the motion, concluding that there was no denial of substantive due process in the forfeiture proceedings. Cessna petitioned for review of this ruling.

The petitions were granted[5] and the cases consolidated. The first issue that must be considered is whether the superior court erred in requiring an element of mens rea in the offense for which Rice was convicted.

Rice was convicted of violating 5 AAC 81.140(b), which provides: "No person may possess or transport any game or parts of game illegally taken." Rice contended on appeal and the superior court agreed that

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[5] Petitions were granted in the criminal case under former Alaska R. App. P. 23(c)(3) and in the civil case under former Alaska R. App. P. 23(d). We concluded that review should be granted pursuant to former Alaska R. App. P. 24(a)(1) since the issues were of such substance and importance as to warrant deviation from normal appellate procedures.

there is an implied element of intent in this offense, and that the accused must have known, or reasonably should have known, that the game was illegally taken. The state on appeal to this court argues that such an element should not be implied.

During argument on jury instructions before the district court, Rice's counsel brought up the issue of scienter and, after discussion, specifically requested an instruction that in order to convict, the jury "must be satisfied that the person either knew, or reasonably should have known, that the game or parts of game were illegally taken."[6] The district court denied the requested instruction, and Rice was convicted.

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[6] The state argues that the court must consider the question under the plain error standard since "the only instruction discussed in the points on appeal [to the superior court] and in the defendant's brief was a requested instruction that the jury must find beyond a reasonable doubt

This court has several times considered the question of whether a statute, which does not explicitly require criminal intent, implicitly requires it. The general position of the court was recently summarized in State v. Guest, 583 P.2d 836, 838 (Alaska 1978) (footnotes omitted):

> We recognized in in [sic] Spiedel v. State, 460 P.2d 77 (Alaska 1969), that consciousness of wrongdoing is an essential element of penal liability. 'It is said to be a universal rule that an injury can amount to a crime only when inflicted by intention -- that conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.' Id. at 78. . . .
>
> Our opinion in Spiedel stated that there are exceptions to the general requirement of criminal intent which are categorized as 'public

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(footnote 6 continued)

that the defendant knew that the meat he transported was illegally taken." However, the actual transcript reveals that Rice requested an instruction in the form "know or reasonably should know." Therefore, the point was properly raised below, and the state's argument to the contrary is rejected.

> welfare' offenses. These exceptions are a rather narrow class of regulation, 'caused primarily by the industrial revolution, out of which grew the necessity of imposing more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety or welfare.' Spiedel v. State, supra, at 78. The penalties for the infraction of these strict liability offenses are usually relatively small and conviction of them carries no great opprobrium. Id. at 79.

The question is whether 5 AAC 81.140(b) is a public welfare regulation for which the omission of any requirement of criminal intent is valid. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), we stated that such determinations are to be made on a case-by-case basis. It must be remembered that strict liability is an exception to the rule which requires criminal intent. Criminal statutes will be strictly construed to require some degree of mens rea absent a clear legislative intent to the contrary. Even when a statute, or a regulation, does not explicitly require any

element of mens rea, we will scrutinize the statute or regulation to determine whether mens rea must be made part of the definition of the particular offense.[7]

Strict liability offenses were originally considered in F. Sayre's classic article, Public Welfare Offenses,[8] in

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[7] In State v. Campbell, 536 P.2d 105 (Alaska 1975), we had implied that mens rea requirement would only be applied in crimes with common law origins. In Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), this court overruled Campbell and held that intent under certain circumstances would be read into non-common law offenses:

> Accordingly, we hold that to the extent that our decision in Campbell established the broad rule that criminal intent can be found by implication only in statutes which codify common law crimes, Campbell is overruled. Although we can conceive of cases where we may decline to imply such intent into statutes silent in this respect, hereafter we will resolve such questions on a case by case basis.

[8] F. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

which he concluded that these offenses fell into certain limited categories.[9] Among these are "violations of general

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[9] Sayre grouped the categories as follows:

(1) Illegal sales of intoxicating liquor;
  (a) sales or prohibited beverage;
  (b) sales to minors;
  (c) sales to habitual drunkards;
  (d) sales to Indians or other prohibited persons;
  (e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
  (a) sales of adulterated or impure milk;
  (b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
  (a) annoyances or injuries to the public health, safety, repose or comfort;
  (b) obstructions of highway;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health or wellbeing of the community.

Id. at 73 (footnote omitted).

police regulations."[10] These encompass, as originally proposed by Sayre, fish and game regulations,[11] and a number of fish and game regulations have been upheld on the theory of strict liability.[12] Thus, the mere fact that the case at bar involves a fish and game regulation might perhaps be considered by some to be sufficient to justify characterization of the subject offense as a strict liability offense.

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10 Id.

11 Id. at 87-88.

12 United States v. Ayo-Gonzales, 536 F.2d 652, 662 (5th Cir. 1976) (no intent required for statute prohibiting foreign vessels from fishing within contiguous fishing zone of United States); United States v. Ardoin, 431 F. Supp. 493, 495 (W.D. La. 1977) (offense of migratory bird hunting with aid of bait as a crime without intent); State v. Barber, 581 P.2d 27, 28-30 (N.M. 1978) (hunting by spotlight requires no criminal intent).

Nevertheless, we think that other concerns must also be considered. Fish and game regulations are not necessarily by their very nature immune from the requirement of mens rea. As we noted in Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), a danger of unconstitutionality is a relevant concern in determining whether to construe intent into the regulation:

> Finally, we note that in Campbell, we recognized the well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality. We have alluded to this rule on many other occasions. It recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits. 2 Sutherland Statutory Construction, § 4509, at 326 (Horack 3d Ed. 1943). [footnote and citations omitted]

The wording of the regulation under consideration, 5 AAC 81.140(b), is broad. It provides: "No person may possess or

transport any game or parts of game illegally taken." Upon appeal to the superior court, Rice attacked the regulation as being void for vagueness. It is quite apparent from a reading of the transcript of the hearing before the superior court that the court was concerned with the broad applicability of the statute. It noted that, under the statute, if illegally taken game were found on board a commercial aircraft then the commercial airplane would also be subject to forfeiture. The seeming absurdity of the possible seizure of a commercial aircraft for shipping a piece of moose meat that would in no fashion reflect the fact that the moose was illegally killed no doubt had a persuasive impact on the superior court in reading an intent requirement into the regulation. By interpreting the regulation to embody a reasonable person standard in the phrase "knew or should have known," the superior

court concluded that the regulation was not void for vagueness.

A recent treatment of a claim of void for vagueness is found in this court's opinion in Holton v. State, 602 P.2d 1228 (Alaska 1979). In Holton, we set forth three factors that are applicable in considering such a claim:

> First, a statute may not be so imprecisely drawn and overbroad that it 'chills' the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authority undue discretion to determine the scope of its prohibitions.[13]

The first is not applicable here, since the regulation does not concern First Amendment

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[13] Holton v. State, 602 P.2d 1228, 1235-36 (Alaska 1979), quoting Summers v. Anchorage, 589 P.2d 863, 866-67 (Alaska 1979) (footnotes omitted).

rights of speech, religion, association and expression.[14] The third consideration is also not applicable since recent cases have stated that this court "will not invalidate a statute on these grounds unless there is some history of arbitrary or selective enforcement"[15] and there was no showing of such a history in this case.

Thus, it is on the second of these factors, that of adequate notice, that a claim of void for vagueness must rest. In Stock v. State, 526 P.2d 3, 8 (Alaska 1974), we noted:

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[14] See e.g., Larson v. State, 564 P.2d 365, 372 (Alaska 1977) ("The criminal acts with which Larson was charged do not involve the exercise of these [First Amendment] rights, so this consideration is not pertinent.").

[15] Holton v. State, 602 P.2d 1228, 1237 (Alaska 1979); see Summers v. Anchorage, 589 P.2d 863, 868 (Alaska 1979).

The second consideration is that a statute must give adequate notice to the ordinary citizen of what is prohibited. This principle involves basic fairness and was long ago enunciated by the United States Supreme Court in Connally v. General Construction Co., stating:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the 'overbreadth' problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [footnotes omitted]

We find with the superior court that the statute is overbroad and that a proper limiting construction, implying a "know or reasonably should know" standard, is necessary to render the regulation constitutional.

In this case, we note that other state regulations concerning possession of illegally taken wildlife, specifically shrimp and crab, require criminal intent and take the form, "it is unlawful for any person to possess [shrimp or crab] . . . if that person knows or has reason to know that such shrimp was taken or possessed in contravention of the regulation of this chapter."[16] We conclude that identical

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[16] 5 AAC 31.090(c) provides:

(c) It is unlawful for any person to possess, purchase, barter, sell, or transport shrimp within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such shrimp were taken or possessed in contravention of the regulations of this chapter.

(footnote 16 continued)

5 AAC 32.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell, or transport dungeness crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such dungeness crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell, or transport king crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

These regulations were promulgated pursuant to AS 16.10.210 which provides:

> Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner.

language implying at least the element of negligence must be read into 5 AAC 81.140(b). Therefore, we affirm the superior court's setting aside of Rice's conviction because of the district court's failure to instruct the jury on this element of the alleged offense.

We note, additionally, that an alternative analysis compels the same result. Under the Alaska Constitution, "[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974). See also Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92, 101 (Alaska 1974). For the reasons discussed above, we believe that if enforced according to its literal terms, as imposing liability on any person who possesses or transports illegally taken

game without regard to whether such person knew or should have known of the illegality, 5 AAC 81.140(b) would bear no reasonable relationship to the legitimate regulatory purpose underlying it. We are therefore persuaded that the superior court's interpretation of 5 AAC 81.140(b) is required by substantive due process principles as well as by the void for vagueness rationale relied upon by this court.

Cessna has urged that both substantive and procedural due process have been or will be violated by forfeiture of Rice's airplane, in which Cessna has a security interest.[17] We first consider whether substantive due process is violated by the act of forfeiture itself, since such a

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[17] Cessna's security interest was $36,953.16 plus a substantial amount of interest.

finding would require return of the plane and would render the question of procedural due process moot.

The question before the court specifically is whether the superior court erred in failing to grant summary judgment for defendant Cessna Finance in the civil forfeiture action initiated by the state. Given its security interest in the airplane and its innocence in respect to the criminal offense upon which the forfeiture is based, Cessna contends that the civil forfeiture statute, AS 16.05.195,[18] deprives it of a property right without just compensation. Cessna does not contend that forfeiture is unconstitutional in respect to Rice, the titleholder of the airplane, but only as to itself as innocent holder of a security interest in the plane.

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[18] See note 4 supra.

The subject of forfeitures and their application to innocent parties' property was recently considered at length by the Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d 452 (1974). In Pearson Yacht, a yacht owned by Pearson had been leased to two persons, one of whom used it for transportation of marijuana, and thus it was subject to seizure under a Puerto Rican forfeiture statute. The Supreme Court, in determining that there was no constitutional violation in such seizure, offered a succinct discussion of the applicable law in this area. 40 L. Ed. 2d at 466-67.

As that Court observed, the history of forfeiture is deeply rooted in the common law with even Biblical origins.[19] It has

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[19] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681, 40 L. Ed. 2d 452, 466-67 (1974). For a comprehensive discussion of the history of forfeiture, see J. Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures,

received widespread use and approval throughout the history of American jurisprudence.[20] "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."[21]

(footnote 19 continued)

Wrongful Death and the Western Notion of Sovereignty, 46 Temple L. Q. 169 (1973).

[20] [A]lmost immediately after the adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

416 U.S. at 683, 40 L. Ed. 2d at 468 (footnote omitted).

[21] Id. See also United States v. One 1967 Cadillac Eldorado, 415 F.2d 647, 648-49 (9th Cir. 1969), and cases cited therein; United States v. One 1950 Burger Yacht, 395 F. Supp. 802, 803 (S.D. Fla. 1975).

The first suggestion for qualification came in the Supreme Court's opinion in United States v. United States Coin & Currency, 401 U.S. 715, 28 L. Ed. 2d 434 (1971), which seemed to indicate that lack of significant involvement in the criminal enterprise was a defense. Subsequently, in Pearson Yacht, the Supreme Court stated that such a conclusion was wrong. "Coin and Currency did not overrule prior decisions that sustained application to innocents of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons 'significantly involved in a criminal enterprise'"[22] The Court noted two instances in which constitutional questions might still arise. The first, if the property had been seized

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[22] 416 U.S. at 688, 40 L. Ed. 2d at 471.

when it was used without the owner's consent,[23] is not applicable in this case. The second instance alluded to by the Supreme Court involves "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[24] Cessna argues that

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[23] [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.

416 U.S. at 689, 40 L. Ed. 2d at 471.

[24] Id. [footnote omitted).

In F/V American Eagle v. State, 620 P.2d 657, 666-68 (Alaska 1980), we considered a claim by owners of a seized fishing vessel that they were entitled to remission as innocent third parties. On the facts, we determined that all the owners were active business partners in the fishing vessel's activity and failed to demonstrate that they had done all that reasonably could be expected to prevent the proscribed use of the property.

this latter circumstance is parallel to its position in the case at bar. In such circumstances, the Supreme Court noted that "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[25]

The primary purpose for forfeiture as noted by the Supreme Court in Pearson Yacht is as follows:

> Forfeiture of conveyances that have been used -- and may be used again -- in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.[26]

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[25] 416 U.S. at 689-90, 40 L. Ed. 2d at 472.

[26] See note 38 infra and accompanying text.

This passage clearly suggests that under federal constitutional due process, forfeiture of the interest of an innocent security holder, rather than that of an owner, is not violative of substantive due process, and does not come under the exception noted above. Several federal courts[27] and state courts[28] have so held.

Cessna asks, however, that we review its claim under the substantive due process clause of the Alaska Constitution. As we

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27 See United States v. One 1969 Plymouth Fury Auto, 476 F.2d 960, 961 (5th Cir. 1973), reh. denied, 509 F.2d 1324, cert. denied sub nom. Ford Motor Credit Co. v. United States, 423 U.S. 838, 46 L. Ed. 2d 57 (1975); United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir.), cert. denied sub nom. Bank of America Nat'l Trust & Savings Ass'n v. United States, 409 U.S. 850, 34 L. Ed. 2d 92, reh. denied, 409 U.S. 1050, 34 L. Ed. 2d 503 (1972).

28 See e.g., Commonwealth v. One 1977 Pontiac Grand Prix Auto, 378 N.E. 2d 69, 72 (Mass. 1978); Dillon v. Barefoot, 389 N.Y.S. 2d 513 (N.Y. Sup. 1976).

have previously noted, although this court is bound to enforce constitutional protections under the Federal Constitution, we also have a concomitant duty to develop constitutional rights under the Alaska Constitution:

> if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by . . . waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (footnotes omitted).

Cessna's claim under both the Federal and State Constitutions is largely based on the lack, under the Alaska statutory scheme, of a remissions procedure. Alaska's forfeiture statute only allows for

remission when an innocent buyer subsequently purchases, in good faith, property subject to forfeiture.[29] It makes no provision for remission to an innocent owner or security holder.[30] On the

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[29] AS 16.05.195(e) provides:

> No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

[30] A bill was before the Alaska legislature in the 1979 session to provide for remission and adopt procedures for remission in this situation. Committee Substitute for S.B. 7, 11th Leg., 1st Sess. (1979). The bill provided for a new statute which would have read, in part:

> (d) If an item specified in AS 16.05.190(a) is forfeited, a claimant who holds an interest in the item and has filed a timely claim, may petition the court in which the action is pending for remittance of his interest upon showing at a hearing before the court as trier of fact that
>
> (1) he holds a valid interest in the item and
>
> (2) he was not a consenting party to nor privy to the illegal act.

other hand, the state notes that remission for forfeitures and fines is available by application to the governor under his power of executive clemency:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

Alaska Const. art. III, § 21. Cessna argues that this is not a substitute for an administrative remission procedure and that no procedures have been established for remission under executive clemency.

Cessna also points to the text of a footnote in Pearson Yacht in which the Supreme Court notes the long history of federal provisions for remission of forfeited property to innocent owners:

> Since 1790 the Federal Government has applied the ameliorative policy -- first adopted in England -- of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense. Indeed, forfeitures incurred

> under 21 USC § 881(a), which served as the model for enactment of the disputed Puerto Rican statute, are subject to the remission and mitigation procedures of 19 USC § 1618. Regulations implementing § 1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 CFR § 171.13(a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 CFR § 171.13(b). See also 18 USC §3617(b) establishing standards for judicial remission and mitigation of forfeitures resulting from violations of the internal revenue laws relating to liquor.[31]

The importance of a remission procedure has also been noted in several other cases.[32]

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[31] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27, 40 L. Ed. 2d 452, 471 n.27 (1974) (citations omitted).

[32] United States v. United States Coin & Currency, 401 U.S. 715, 721, 28 L. Ed. 2d 434, 439 (1971); United States v. One 1976

The state argues that none of these cases hold that remission is constitutionally required. However, after careful consideration, we are persuaded that a remission procedure is mandated under the Alaska Constitution. Not to allow innocent owners and security holders to show that they have not been involved in the criminal activity that triggered the forfeiture proceeding violates Alaska's constitutional due process provision.

The law of forfeiture, as already noted, is of ancient origin dating back to Biblical times. The theory of civil forfeiture is that the action is in rem, against the object. As the Supreme Court noted in United States Coin & Currency:

(footnote 32 continued)

Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979); United States v. One 1974 Mercury Cougar, 397 F. Supp. 1325 (C.D. Cal. 1975).

> [F]orfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. . . . The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. More remarkable, the Government's complaint charges the money with the commission of an actionable wrong. [footnotes omitted] [emphasis in original]

401 U.S. at 719-20, 28 L. Ed. 2d at 438. Although the implicit fiction in forfeiture actions is often acknowledged by courts, lingering concepts derived from that fiction have kept forfeitures from receiving clear analysis. As one commentator noted:

> An automobile that had been used to violate the revenue laws, or the narcotics laws is not a 'dangerous res. . . . It is neither more nor less dangerous to the public welfare or safety than any other automobile. The simple proof of the distinction, of course, is that such confiscated automobiles are not in fact destroyed, but are ultimately sold, their proceeds going to the public treasury, while the cars themselves, having publicly 'expiated' for being 'offending reae,' may resume their normal 'life' on the public highways. The ox that gored a person to death was

> treated as a real felon -- as were all those domestic animals that were tried before regular courts in the Middle Ages for causing the death of a person -- and was duly executed. The procedure was the natural consequence of a bona fide concern about a human life and not a subterfuge by means of which the authorities were aiming to penalize the owner of the beast. The modern doctrine of the offending res, on the other hand, is a deliberate subterfuge -- a judicial fiction, by resort to which the sovereign, with the sanction of the courts, can impose a punishment on a blameless individual who is thereby deliberately left without recourse to his constitutional rights of due process.[33]

What purpose is left then to forfeiture if it is not to destroy and expiate the offending res? One purpose is to prevent possible use of the property in further illicit acts.[34] This purpose is well served when the seized property is not

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[33] See J. Finkelstein, supra note 19 at 252.

[34] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687, 40 L. Ed. 2d 454, 470 (1974); F/V American Eagle v. State, 620 P.2d 657, 668 (Alaska 1980).

returned to the offender. It is not served when the interests of innocent non-negligent third parties are left unprotected or uncompensated. All that remain as purposes for forfeiture are the goals generally advanced for penal measures.[35]

If this is accurate, then what purpose is served by punishing the owner who has done all that reasonably could be expected to prevent illegal use? Or in punishing a security holder who has an interest in the forfeited item and has done everything possible to prevent its illegal use, especially considering the minimal control that a security holder has over an item whose ownership is in the hands and direct control of another? The Supreme Court, in Pearson Yacht, stated that as to secured creditors, "confiscation may have the

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[35] See State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

desirable effect of inducing them to exercise greater care in transferring possession of their property."[36] We think that limits must be recognized as to the care a creditor can be required to take to safeguard a security interest. We think that if a party can show "the manner in which the property came into possession of such other person" and that "prior to parting with the property he did not know, nor have reasonable cause to believe,

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[36] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-88, 40 L. Ed. 2d 452, 470-71 (1974). The Court also noted:

> Seizure and forfeiture statutes also help compensate the Government for obtaining security for subsequently imposed penalties and fines. [citations omitted]

416 U.S. at 687 n.26, 40 L. Ed. 2d at 470 n.26. We do not find these interests compelling when the seizure involves property of innocent owners and security holders.

[either] that the property would be used to violate [the law, or] . . . that the violator had a criminal record or a reputation for commercial,"[37] substantive due process under the Alaska Constitution requires that a procedure be available for remission of the forfeited item.

Here, Cessna Finance has asserted it is an innocent holder of an interest in the seized airplane which did all it could reasonably be expected to do. We conclude that Cessna has been deprived of its constitutional rights to substantive due process through the failure of the statutory scheme relating to forfeitures to provide for remission of the interests of innocent non-negligent third parties in the forfeited item. Thus, the case is remanded to the superior court to hold a remission

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[37] 19 CFR § 171.13(a).

hearing. If Cessna Finance can make the requisite showing,[38] it is entitled to reimbursement from the state for its share in the forfeited airplane at the time of seizure.

Having determined that the forfeiture itself violated substantive due process, we need not consider whether the superior court was correct in finding that procedural due process was also violated.

AFFIRMED in part; REVERSED in part.

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[38] The state argues that Cessna had not done anything more than a routine credit check. However, it seems that Rice had neither a prior criminal record nor a record or reputation as a game law violator. If the inquiry would have revealed nothing, the loan was made in good faith. If Cessna had no knowledge that Rice was a violator of the game laws and was not negligent in its inquiry, it is entitled to remission. Cf. United States v. One 1972 Ford Pickup Truck, 374 F. Supp. 413, 415 (E.D. Tenn. 1973).

MATTHEWS, Justice, concurring.

I agree with the result of the majority opinion. However, the majority's reasons for imposing a mens rea requirement as a part of 5 AAC 81.140(b) seem to me to be somewhat unfocused.

The majority's first reason is that without a mens rea requirement the regulation is overbroad and is therefore void for vagueness. The concept of overbreadth as it is used in vagueness cases refers to a lack of fair notice as to what conduct is punishable. Stock v. State, 526 P.2d 3, 8 (Alaska 1974). Here there is fair notice in the sense that the regulation is linguistically precise in delineating the type of conduct proscribed. The problem with it is that it includes within its ambit the conduct of people who have no reason to believe that what they are doing is criminal. I suggest, therefore, that the

vagueness rationale does not support the conclusion reached.

The alternative reason set out by the majority strikes down the regulation because it has no reasonable relation to a legitimate governmental purpose. Once again, this is at best a tangential expression of what is wrong with the regulation. There certainly is a legitimate government interest in preventing the unlawful killing of game, and imposing strict forfeiture or criminal fines on persons who transport unlawfully killed game bears a relationship to the accomplishment of that purpose.

I would require mens rea as an element of this regulation because the penalty for its violation includes a possible six-month term of imprisonment. See AS 16.05.900(a). In my view due process requires that there be a culpable mental state in every case where a sentence of imprisonment may be

imposed. Although we have never unconditionally adopted such a rule, our cases suggest that it is appropriate.

In Speidel v. State, 460 P.2d 77 (Alaska 1969) we held that a culpable mental state must exist for there to be a conviction of a crime. We recognized a "public welfare offense" exception to this rule, and noted that such offenses are characterized by relatively small penalties, and conviction of them does not significantly damage one's reputation. Id. at 79.

In Alex v. State, 484 P.2d 677, 681 (Alaska 1971), we reaffirmed the principles of Speidel and noted "the necessity of basing serious crimes upon a general criminal intent as opposed to strict criminal liability which applies regardless of intention," the goal being to "avoid criminal liability for innocent or inadvertent conduct." Accord Kimoktoak v. State,

578 P.2d 594 (Alaska 1978); State v. Guest, 583 P.2d 836 (Alaska 1978).

Likewise, in the recent case of Hentzner v. State, 613 P.2d 821, 825 (Alaska 1980), we noted that the "'general conditions of penal liability' require 'not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.'"

These cases establish that mens rea is an essential element for criminal liability, except as to crimes for which the penalties are relatively small, and do minimal damage to the offender's reputation. In my view, any prison sentence is an important, even traumatic, event in the life of a human being, especially one who conducts his affairs with an intent to conform to the norms required by law. Further, any prison sentence is likely to have a considerable detrimental effect on

one's reputation. The laws of our society should not be structured so that an individual may be jailed for conduct which he reasonably believes to be lawful. Therefore, I believe that a mens rea requirement should be imposed in all cases in which the penalty may be incarceration.[1]

Many commentators agree with this position. For example, in F. Sayre's article, Public Welfare Offenses,[2] he notes that the severity of the penalty represents a cardinal principle upon which

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[1] The possibility of incarceration is a dividing line between serious and non-serious crimes for other purposes in the criminal law such as the right to trial by jury and to court appointed counsel. Alexander v. City of Anchorage, 490 P.2d 910, 915 (Alaska 1971); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).

[2] F. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

to determine whether mens rea should be required. He concludes that if the possible penalty is serious, particularly if it involves imprisonment, the defendant's individual interest weighs too heavily to allow conviction without proof of mens rea:

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable by prison sentences, therefore, ordinarily require proof of a guilty intent.[3]

Accord W. LaFave & A. Scott, Handbook on Criminal Law § 31 at 218 (1972); Model Penal Code § 2.05, Comments (Tent. Draft No. 4, 1955).

For these reasons I agree that a mens rea element should be read into 5 AAC 81.140(b).

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[3] Id. at 72.